DOCKET

No. 87-339-CFX
Status: GRANTED

Title: City of New York, City of Miami, City of Wheaton and National League of Cities, Petitioners
v.
Federal Communications Commission, et al.

Docketed:
August 25, 1987

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Koerner,Leonard J.

Counsel for respondent: Solicitor General, Schooler,Michael S., Glist,Paul

Entry	Date	Note	Proceedings and Orders
1	Aug 25 1987	G	Petition for writ of certiorari filed.
2	Aug 25 1987		Appendix of petitioner New York, Miami, etc., et al. filed.
4	Sep 22 1987		Order extending time to file response to petition until October 26, 1987.
5	Sep 22 1987		The above extension applies to all respondents.
6	Oct 26 1987		Brief of respondent Natl. Cable TV Assn. in opposition filed.
7	Oct 26 1987		Order further extending time to file response to petition until November 9, 1987.
8	Nov 9 1987	X	Brief of respondent FCC in opposition filed.
10	Nov 10 1987		DISTRIBUTED. November 25, 1987.
11	Nov 30 1987		Petition GRANTED.
			**********
13	Dec 21 1987		Order extending time to file brief of petitioner on the merits until January 21, 1988.
19	Jan 11 1988		Record filed.
		*	Certified copy of original record received.
14	Jan 21 1988		Order further extending time to file brief of petitioner on the merits until January 25, 1988.
15	Jan 25 1988		Brief amici curiae of U.S. Conference of Mayors, et al. filed.
16	Jan 25 1988		Brief amici curiae of Montgomery County, MD, et al. filed.
17	Jan 25 1988		Joint appendix filed.
18	Jan 25 1988		Brief of petitioners New York, Miami, etc., et al. filed.
20	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 29, 1988. (3rd case).
21	Feb 10 1988	G	Motion of the Solicitor General for divided argument filed.
22	Feb 22 1988		Motion of the Solicitor General for divided argument GRANTED.
24	Feb 23 1988		Order extending time to file brief of respondent on the merits until March 3, 1988.
25	Mar 1 1988		CIRCULATED.
26	Mar 3 1988	X	Brief of respondent Natl. Cable TV Assn. filed.
27	Mar 3 1988		Order further extending time to file brief of respondent on the merits until March 4, 1988.
28	Mar 3 1988	X	Brief of respondents FCC, et al. filed.
29	Mar 22 1988		Reply brief of petitioners New York, Miami, etc., et al. filed.
30	Mar 29 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
AUG 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-339

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals applied an erroneous legal standard when it found that the Cable Act of 1984 allowed the Federal Communications Commission to preempt all local and state regulation of cable television signal quality and replace it with essentially no regulation at all, when the majority could not find in the statute and its accompanying legislative history a clear manifestation of congressional intent to preempt.

LIST OF PARTIES

The following listed parties filed appearances in the appeal before the United States Court of Appeals for the District of Columbia Circuit:

The City of New York, Petitioner.

The Federal Communications Commission and United States of America, Respondents.

Intervenors in support of Petitioner: National League of Cities; New York Citizens' Committee for Responsible Media; City of Miami, Florida; City of Wheaton, Illinois; City of Dallas, Texas; City of Scottsdale, Arizona; City of St. Louis, Missouri; Montgomery County; Maryland; and the Sacramento Metropolitan Cable Television Commission.

Intervenors in support of Respondent: National Cable Television Association, Inc.; TeleCable Corporation; Viaco International, Inc.; Gill Industries; Post-Newsweek Cable, Inc.; Association of Maximum Service Telecasters, Inc.; and National Association of Broadcasters.

Amici Curiae in support of Petitioner: United States Conference of Mayors and the City of Los Angeles, California.

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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The petitioners, the City of New York, the City of Miami, the City of Wheaton, and the National League of Cities, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on March 20, 1987.

The Court of Appeals order denying the present petitioners motion for a rehearing of the appeal, or for rehearing en banc, was entered on May 27, 1987. Upon a challenge by cable television franchisors to Federal Communication Commission's rule-making which preempted local cable television technical standards, a majority of the Court of Appeals held that the legislative history of the Cable Act provision authorizing cable franchisors to establish technical standards which were not inconsistent with those established by the FCC, did not prevent the Commission from preempting more onerous local standards for the class of cable channels for which FCC standards existed. The Court further held, unanimously, that the Commission's rule-making with respect to other classes of channels was arbitrary and capricious within the meaning of the Administrative Procedure Act, since the

Commission, in refusing to enact standards for those classes or to allow franchisors to do so, had failed to consider the Cable Act's franchise renewal requirements.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit upholding, in part, the Commission's rule-making, is reported at 814 F.2d 720 and is reprinted in the Appendix at page 4.

The orders of the Court of Appeals denying rehearing and rehearing en banc, are printed in the Appendix at page 1 and page 2 respectively.

The Report and Order of the Federal Communications Commission under review in this proceeding is published at 50 Fed. Reg. 52, 462 (December 24, 1985), and is printed in the Appendix at page 49.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1987. The order of the Court of Appeals denying rehearing was entered May 27, 1987. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1). The petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) is codified at 47 U.S.C. §521 et seq. (Supp. II 1984). Relevant portions of the Cable Act are printed in the Appendix at page 96.

STATEMENT OF THE CASE

(1)

This appeal raises the question whether the Federal Communications Commission (hereinafter "FCC" or "Commission") has the power, after the enactment of the Cable

Communications Policy Act of 1984 (hereinafter "Cable Act") to prohibit states and localities from adopting cable television technical standards which supplement and are more comprehensive than FCC guidelines which are so minimal that they amount to no guidelines at all. In October, 1985, the FCC promulgated a rule that both established federal technical standards for signal quality of one class of cable television programming and forbade local cable franchisors from imposing standards of their own. Petitioner City of New York and various intervenors chalienged this rule, contending it exceeded the preemption authority granted the FCC by the Cable Act of 1984. It is petitioners position that the Cable Act authorizes the FCC to preempt local and state technical standards only where they are inconsistent with particular standards established by that agency, and not where such standards

conflict with some general marketplace philosophy originally adopted by the FCC prior to the Cable Act.

(2)

The Cable Act

Beginning in the mid-1970's the FCC severely restricted local and state efforts to ensure that cable systems provide an acceptable level of service. Wedded to a hands-off "marketplace" approach to cable regulation, the Commission eliminated virtually all of its own cable regulations and preempted many local and state cable regulations, including those dealing with signal quality technical standards.

The Commission's actions were taken pursuant to authority under the original Communications Act of 1934, 47 U.S.C. §151 et seq. (1982) which was enacted well before the advent of cable television.

Concerns over the erosion of their authority to deal with cable systems and to enforce negotiated franchise provisions ultimately led local and state governments to support passage of the Cable Act. The Act is based upon a compromise agreement among representatives of state and local governmental interests and the cable industry negotiated over a period of some three years. It represents Congress' seminal effort to specify the ground rules under which federal, state and local authorities may regulate cable television.

In "firmly establish[ing] the authority at each level of government," See H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984) (hereinafter "Committee Report"),[1]

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[1]The Committee Report was drafted by the House Committee on Energy and Commerce. The Committee Report and certain floor
(Footnote Continued)

Congress was called upon to balance a number of different and often conflicting considerations with regard to a wide range of issues. See Cable Act §601, 47 U.S.C. §521. Congress did so by adopting a policy which "continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." Committee Report at 19. As Congress recognized, "city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."

(Footnote Continued)
debates were specifically adopted by both the Senate and the House as their explanation of the Act. See 130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984) (statement of Senator Packwood); 130 Cong. Rec. H12235 (daily ed. Oct. 11, 1984) (statement of Congressman Wirth).

Id. at 24. Congress thus intended that the Cable Act would "preserve the critical role of municipal governments in the franchise process." Id. at 19. See also Id. at 20 (noting that Cable Act "[g]rants local governments substantial authority to enforce franchise agreements").

The passage of the Cable Act heightened franchising authorities' concerns with signal quality issues. Congress specifically identified in the Act, for the first time, the procedures which each franchising authority must follow and the criteria it must consider in determining to renew a cable franchise. These criteria include the cable operator's "signal quality" and "response to consumer complaints," the majority of which involve signal quality. Cable Act §626(c)(1)(B), 47 U.S.C. §546(c)(1)(B). Throughout Congress' consideration of cable legislation, franchising

authorities had sought the right to establish standards which objectively define an acceptable level of signal quality. Congress responded by authorizing franchising authorities to adopt technical standards that are not "inconsistent" with "standards" actually "established" by the Commission. Committee Report at 70.

(3)

The FCC Technical Guidelines

Cable systems have the capacity to provide their subscribers with a multiplicity of television channels containing a diversity of programming and nonprogramming services. The Commission has classified the various cable services into four separate categories:

> "Class I Cable Channels," which are devoted to the delivery of conventional over-the-air television broadcast stations.
>
> "Class II Cable Channels," which are devoted to the delivery of non-broadcast television services

provided without the use of decoding devices (e.g., satellite-delivered programming services such as Cable News Network, ESPN, and Black Entertainment Television; access channels programmed by and for local residents and governmental and educational institutions; channels originated by the cable operators themselves).

"Class III Cable Channels," which are devoted to the delivery of non-broadcast television services and which may be received only with the use of a decoding device (e.g., pay cable movie services such as Home Box Office; FM or AM radio stations; and data transmissions).

"Class IV Cable Channels," which provide two-way interactive services."

At the time that the Commission adopted its cable technical rules in 1972, systems did little more than provide better reception of conventional broadcast television signals. Consequently, the Commission made its rules applicable only to Class I channels. Modern cable systems, however, typically provide a number of services in addition to the

retransmission of conventional television stations. In fact, the majority of cable services offered by most contemporary systems consist of non-Class I channels. Nevertheless, the Commission's technical rules have remained applicable only to Class I channels and have never provided any standards for signal quality on Class II, III and IV channels.

Even with regard to Class I channels, the Commission has failed to address a number of important parameters which affect the technical quality of the picture received by cable subscribers. The Commission has adopted only four technical guidelines which directly affect signal quality of Class I channels. A cable system which meets or exceeds these four guidelines may nevertheless provide an unacceptable picture on Class I channels if its performance, as tested by parameters for which the FCC has

failed to set standards, is inadequate. The missing parameters, some 20 in number, were identified in engineering statements submitted to the Commission below.

(4)

The Proceedings Before the FCC

On February 12, 1985 the Commission issued a "Notice of Proposed Rulemaking in MM Docket No. 85-38," 50 Fed. Reg. 7801 (1985) (hereinafter "NPRM") stating that it was "appropriate to re-examine and update the [cable technical] rules at this time." NPRM ¶1. The Commission acknowledged that these rules had become outdated as a result of industry changes. Id. ¶5. But rather than "update" its cable technical rules, the Commission proposed their deletion. According to the Commission, cable operators "are capable of transporting products at quality levels far exceeding those specified in [the Commission's] Rules."

Id. ¶7. The Commission also noted that the cable industry had developed its own set of signal quality standards which "in general exceed" the FCC rules. NPRM ¶8. Believing that the marketplace would ensure adequate signal quality, the Commission saw no "need" for cable technical rules. Id. ¶9.

The Commission was concerned that franchising authorities might fill the regulatory void by imposing "overly burdensome" technical requirements and that this would have an "adverse impact on the growth of cable television." NPRM ¶10. The Commission thus proposed to publish its technical rules as "guidelines" in an Office of Science and Technology (hereinafter "OST") bulletin, and to prohibit franchising authorities from adopting any technical requirements which "go beyond" those guidelines. Id. The Commission concluded, based upon a two-sentence "analysis," that

it has the power under the newly enacted Cable Act to maintain such a preemption policy. Id.

Franchising authorities and other parties opposed the Commission's preemption policy as overly broad and contrary to the Cable Act.[2] They explained their need for a complete set of objective technical standards, and submitted engineering statements and other information establishing that the FCC technical rules fail to meet this need.

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[2]Franchising authorities also took issue with the Commission's assumption that the marketplace would ensure adequate signal quality. They pointed out that many individuals in areas of poor reception have no choice but to subscribe to cable in order to receive any conventional television signals. They also noted that cable provides many services, including public, educational and government access channels, which are simply not available from any other source. Under such circumstances, an individual's theoretical right to cancel his or her subscription in favor of other media has little practical meaning.

Franchising authorities also took the position that, at the very least, the Commission should comprehensively review and update its 15-year-old technical rules, rather than delete them, to ensure that they define an acceptable level of signal quality for modern cable operations.

Certain cable interests and other parties filed comments generally supporting the Commission. They did not provide any engineering data or otherwise seek to rebut the franchising authorities' claims concerning the inadequacy of the FCC technical rules. Instead, they agreed with the Commission that cable operators are capable of providing a service superior to that required by these rules and that the marketplace would ensure such a service. They also expressed their concern that, absent preemption, some franchising authorities might require cable

operators to provide an unreasonably high level of signal quality.

In its Report and Order in MM Docket No. 85-38, 50 Fed. Reg. 52, 462 (1985), adopted October 31, 1985, the Commission reaffirmed its view that the marketplace, and not government authorities, should determine signal quality standards. Accordingly, the Commission announced that it would no longer enforce, or require compliance with, any of its cable technical rules. Report and Order ¶¶6-10 (A. 58).[3] Rather than following its proposal to delete these rules and place them in an OST bulletin as "guidelines," the Commission relabeled them as "standards" - a distinction which the Commission did not explain and which

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[3]Numbers in parentheses preceded by an "A." refer to pages in the Appendix to the Petition.

appears not to have any substantively different meaning or effect. The Commission concluded that any local or state standards which are different than its "standards," including any and all standards for Class II, III and IV channels, are preempted as "inconsistent" with "our national policy" of marketplace regulation. Id. ¶17. (A. 72).[4]

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[4]The Commission adopted the following "note" to its technical rules:

> "NOTE.- The requirements of Sections 76.605(a)(1) through 76.605(a)(10) do not apply directly to cable systems. These rule sections or less stringent versions of them may be used as standards by state or local regulatory authorities. No technical parameter in excess of the above rule sections may be required."

Theoretically, franchising authorities may adopt technical standards which are "less stringent" or less inclusive than the Commission's. As a practical matter, however, franchising authorities are not likely to do so because the Commission's guidelines are already seriously incomplete

(Footnote Continued)

The Commission was unable to find anything in the Cable Act affecting its pre-Act preemption policy with regard to technical standards; thus, it relied upon pre-Act judicial decisions affirming its authority to use "a clearly articulated policy of deregulation" as a "clear basis for federal preemption." Id. ¶17 n.14, ¶18 (A. 74). The Commission refused to review its former technical rules to ensure that they provide for an acceptable level of signal quality. The Commission said that the marketplace would ensure adequacy and that, in any event, this proceeding was not the appropriate one to consider revisions to its technical rules. Report and Order ¶2 n.2 (A. 54). The Commission also eliminated its

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(Footnote Continued)
and deficient. The Commission's preemption policy thus effectively confines franchising authorities to the Commission's guidelines.

rules requiring cable operators to conduct tests and to maintain records demonstrating their compliance with the FCC technical rules. Id. (A. 78).

(5)

Opinions of the Court of Appeals

After reviewing the history of the proceeding up to that point, the majority addressed the scope of the FCC's preemption authority in light of the passage of the Cable Act. Citing this Court's decision in Louisiana Public Service Comm. v. FCC, ___ U.S. ___, 106 S. Ct. 1890, 1899, 90 L. Ed.2d 369 (1986), the Court of Appeals majority stated that the critical question in any preemption analysis was "whether Congress intended that federal regulation supersede state law" (A. 17). The majority found great significance in the fact that the Cable Act contains no provision that expressly terminates the FCC's prior

preemption policy, nor does the Act or its legislative history contain specific disapproval of the FCC policy.

The majority stated that "[s]ince Congress legislated against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation, we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions (A. 19-20).

It then noted that pursuant to section 624(b)(1) of the Cable Act, Congress had delegated to franchising authorities the right to "establish requirements for facilities and equipment" provided by a cable operator (47 U.S.C. §544(b)(1)). The majority then made the following observations:

> But section 624(a) provides that a franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [the Cable Act]," 47 U.S.C. §544(a) (emphasis added), thus clearly limiting a

franchisor's freedom of action. And section 624(e)- "The Commission may establish technical standards relating to the facilities and equipment of cable systems...," 47 U.S.C. §544(e) (emphasis added),- indicates the authority to curtail that freedom of action was delegated to the FCC, at least insofar as the FCC's "technical standards" overlap the franchisors' specifications of certain "services, facilities and equipment." The only item of legislative history bearing on the meaning of section 624(e) is consistent with that interpretation: "[T]his provision [section 624(e)] does not affect the authority of a franchising authority to establish standards regarding facilities and equipment ... which are not inconsistent with standards established by the FCC under this subsection." House Report at 70, U.S. Code Cong. & Admin. News 1984, p. 4707 (emphasis added).

The FCC interprets the House Report phrase "not inconsistent with" as authorizing it to preempt any franchisor standard that "exceeds" the FCC's own standard. Petitioner argues, however, that "not inconsistent with" means "not contradictory." In other words, petitioner contends the Cable Act permits franchisors to require technical standards more onerous than the Commission's standard so long as no part of the franchisor's standard makes it impossible for

> the cable operator to comply with both the franchisor's and the FCC's specifications. Since the FCC's standards for Class I channels regulate only four of apparently twenty-four possible technical parameters that directly affect signal quality, see 47 C.F.R. §76.-605(a)(7)-(10) (1985), petitioners assert they should be permitted to regulate any technical parameters the FCC left untouched.
>
> We think the words "not inconsistent" are susceptible to both interpretations.

The majority then stated that it found the FCC's interpretation of the statute "the more persuasive" for the following stated reason:

> When it passed the Cable Act, Congress focused on the FCC's policy-just approved by the Supreme Court in Crisp - of preempting local cable technical standards, see supra at 724. But neither the Act's language nor any other piece of legislative history suggests Congress' intent to modify the FCC's past practice-at least with respect to Class I channels. But see dissent at 730-731. Petitioners thus place more weight on the phrase "not inconsistent with" than, without further support, it will bear. The

> FCC's decision to preempt franchisors' technical regulations with its own Class I technical standards, minimal though they may be, cannot be said to exceed its statutorily delegated preemption authority; that broad authority allows the Commission to decide, as it did in this case, that a certain level of regulation is <u>all</u> that is desirable.

The dissent strongly criticized the majority for sanctioning the FCC's assertion of preemption authority in the absence of a clear congressional mandate. The dissent reviewed briefly some of this Court's decisions which have held that a finding of preemption is appropriate only in the face of a clear manifestation of congressional intent. The dissent noted that this line of authority was violated by the majority in finding preemption authority existed, since the majority admittedly found the legislative record ambiguous on the question.

The dissent further found that the FCC's interpretation of the Cable Act does not withstand even "deferential scrutiny".

> As the majority points out, a provision of the House Report contains Congress's most direct statement concerning whether the Cable Act permits states to promulgate technical standards more stringent than those established by the FCC. The provision read, "[Section 624(e)] does not affect the authority of a franchising authority to establish standards regarding facilities and equipment ... which are not inconsistent with standards established by the FCC under this subsection." House Report at 70, U.S. Code Cong. & Admin. News 1984, p. 4707. I cannot agree that this provision is susceptible to the interpretation the FCC urges. The Commission's interpretation, under which federal standards install a ceiling on state regulation, is at odds with the dictionary definition of "inconsistent": more stringent local standards are neither "incompatible," in the sense of incapable of coexistence, see Webster's Third International Dictionary 1144 (1981), nor are they "mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies

the abrogation or abandonment of the other." Black's Law Dictionary 689 (5th ed. 1979). More important, the Commission's interpretation is at odds with common sense. It is clear that once the Commission establishes federal standards for technical quality under 624(e), local franchisors must adhere to them. To say that local franchisors have no authority to impose more stringent standards is to say they have no authority at all, because less stringent regulations only track already binding federal requirements. The Commission's interpretation therefore degrades the House Report's statement of clear intent to preserve state authority into mere lip-service. I cannot endorse the cynical and illogical position that Congress was "protecting" states' authority to issue only redundant regulations to which franchisors already would be bound.

The dissent finally dealt with the majority's willingness to infer that Congress intended the FCC's pre-Cable Act policy of preemption of technical standards to continue.

> The Cable Communications Policy Act of 1984 was Congress's seminal effort to fashion a comprehensive policy for the cable industry. See

House Report at 23. Existing regulatory schemes, conceived in cable's infancy or before, were inadequate to the burgeoning industry. Since Congress was constructing from the ground up, it is incongruous to presume it intended to preserve all elements of the previous makeshift approach unless it specifically disclaimed them. If anything, the opposite presumption-that Congress intended to preserve only those prior policies it expressly endorsed-is the more logical one.

REASONS FOR GRANTING THE WRIT

1. The Majority Opinion Disregards Settled Doctrine Which Requires A Finding of Manifest Congressional Intent to Sanction Preemption

This Court has often admonished that preemption is inappropriate absent a clear manifestation of congressional intent. As the Court observed in Commonwealth v. Montana, 435 U.S. 609, 634 (1981) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)), preemption is not favored

> "in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."

Id. at 634 (emphasis added). This "clear manifestation" rule has been followed consistently by the courts. See Chicago & North Western Transp. Co., v. Kalo Brick & Tile, 450 U.S. 311, 317 (1981); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504

(1981); Los Alamos School Board v. Wugalta, 557 F.2d 709, 714 (10th Cir. 1977), cert. denied, 434 U.S. 968 (1977); Gonzales v. City of Peoria, 722 F.2d 568, 474-75 (9th Cir. 1983). As the Third Circuit noted in Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267, 273 (1984), "Proper respect . . . for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid pre-emption, absent an unmistakable indication to the contrary."

In the present case, however, the majority -- without addressing this rule -- has sanctioned preemption on the basis of statutory language and legislative history which it considers "ambiguous" and "imprecise."

The majority cites no authority which upholds preemption in such circumstances. To the contrary, in New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), the proponents of preemption relied upon legislative history which this Court considered "ambiguous" at best." Id. at 416. The Court concluded that: "Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held "to supersede the exercise' of state action." Id. at 417 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)). The approach of the majority here simply cannot be reconciled with that of this Court in Dublino and other cases which apply the "clear manifestation" rule. Nor does the majority even attempt to do so.

2. The Majority Opinion Disregards Settled Doctrine Which Requires Courts to Reconcile State and Local Initiatives With Federal Law If At All Possible

In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973), where this Court concluded that:

> [W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. ... [T]he proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

Id. at 127 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) (emphasis added)). As the Court in Merrill Lynch further noted, this "approach is supported by decisions extending back to the turn of the century." Id. at 127 n.8 (citations omitted).

The majority here, however, applies an entirely different approach. It makes no effort to reconcile the local and state

initiatives at issue with the Cable Act but instead "strains" to find a preemptive intent. Indeed, the majority authorizes preemption notwithstanding its own conclusion that the relevant congressional language is "susceptible" of an "interpretation" which precludes preemption.

The error in the majority's approach is especially evident when one takes account of those portions of the Cable Act and its legislative history which the majority did not mention in its opinion. More specifically, the critical language -- "not inconsistent" -- is used in several provisions throughout the Cable Act. And in the legislative history accompanying certain of these provisions, Congress unmistakably stated that "inconsistent" does <u>not</u> equate, as the majority has held, with "different" or "more stringent."

-- Section 634 of the Act, 47 U.S.C. § 554, which establishes equal employment opportunity standards for cable systems, provides that "[n]othing in this section shall affect the authority of any State or any franchising authority... to establish or enforce any requirement which is consistent with the requirements of this section ...." Act § 634(i) 47 U.S.C. § 554(i) (emphasis added). Congress explained that "consistent" EEO requirements include those which are "more stringent" and provide "higher equal employment opportunity standards than are provided under this title." Committee Report at 93.

-- Section 633 of the Act, 47 U.S.C. § 553, specifies certain penalties and sanctions for the unauthorized reception of cable services. Section 633(c)(3)(D), 47 U.S.C. § 553(c)(3)(D), states that "[n]othing in this title shall prevent any State or franchising authority from enacting or enforcing laws, consistent with this section, regarding unauthorized interception or reception of any cable service or other communications service." (Emphasis added.) Congress explained that "consistent" laws include those which "impose higher penalties or sanctions than those set forth in this section." Committee Report at 84.

-- Section 631 of the Act, 47 U.S.C. § 551, sets forth various provisions intended to ensure the protection of cable subscribers' privacy. Section 631(g), 47 U.S.C. § 551(g) provides that "[n]othing in this title shall be

construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy." (Emphasis added.) Congress explained that this provision may subject cable systems to "more stringent privacy laws of state and local governments, so long as these laws are consistent with this section." Committee Report at 78.

-- In Section 636 of the Act, 47 U.S.C. § 556, Congress preempted local and state laws which are "inconsistent" with the Act. Congress explained that there are several cable regulatory matters which are "not addressed in the legislation" and which are nevertheless "subject to state and local authority." Committee Report at 59. Congress obviously recognized that local and state requirements which go beyond the specific provisions of the Act can nonethless be consistent with the Act.

In those cases where Congress intended that franchising authorities not go beyond federal standards, Congress specifically said as much in the Cable Act, E.g., § 612(b)(2), 47 U.S.C. § 532(b)(2), which expressly prohibits franchising authorities (and others) from requiring "any cable system to designate channel capacity for

commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1)."

The courts have recognized that "inconsistency" requires more than mere "variance." See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law"); National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819 (1st Cir. 1979) ("The use of the word 'inconsistent' in the [Hazardous Materials Transportation] Act's preemption clause, implies that state laws which merely vary from federal law -- as opposed to those which conflict with federal law -- are not preempted....").

3. The Majority Opinion Disregards Settled Doctrine, And Mischaracterizes the Effect of the Cable Act, By Presuming A Congressional Intent to Codify Pre-Existing FCC Preemption Policies

According to the majority, this case turns upon the singular fact that Congress, in the Cable Act and its legislative history, never "criticized" the FCC's preexisting rules, which preempted technical standards different than the FCC's; in fact, Congress never mentioned these rules one way or the other. The majority thus presumes that Congress must have intended to codify the FCC's policy when it preempted "inconsistent" standards.

Such a presumption is quite improper in a case involving preemption. Preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). See Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1946).

That assumption cannot be overcome, as the majority concludes, by Congressional silence.

The presumption adopted by the majority is "even more specious" in cases such as this which rise under the Cable Act. Dissenting op. at 5. The Cable Act was the product of Congressional dissatisfaction with the manner in which the cable industry had been regulated (or not regulated) at all levels of government as well as court decisions concerning such regulation; Congress sought "to replace" this framework with its own comprehensive national policy. "Since Congress was constructing from the ground up, it is incongruous to presume it intended to preserve all elements of the previous makeshift approach unless it specifically disclaimed them. If anything, the opposite presumption -- that Congress intended to preserve only those prior

policies it endorsed -- is the more logical one." Dissenting op. (A. 48).

The Court of Appeals majority sanctions preemption on the basis of what it believes to be the "more persuasive reading" of "ambiguous" statutory provisions -- a reading whose only support is a novel presumption of preemptive intent and a definition of the term "inconsistent" which conflicts with the use of that term in other provisions of the Cable Act. It is difficult to conceive of a situation where the rights of local and state governments could be abrogated on a more meager showing. Proper regard for the role of local and state authorities, as well as assurance that lower courts adhere to established principles of statutory construction, compel grant of the petition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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APPENDIX

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

87-339 (2)
No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 27, 1987, DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 85-1841

City of New York

v.

Federal Communications Commission and United States of America

BEFORE: MIKVA, RUTH B. GINSBURG AND SILBERMAN, Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
ROBERT A. BONNER
Deputy Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 27, 1987, DENYING SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 85-1841

City of New York

v.

Federal Communications Commission and United States of America

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

O R D E R

Petitioner's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald did not participate in this order.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED MARCH 20, 1987

CITY OF NEW YORK, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

National Cable Television Association, Inc., TeleCable Corporation, Viacom International, Inc., Gill Industries, National Association of Broadcasters, Association of Maximum Service Telecasters, Inc., New York Citizens' Committee for Responsible Media, National League of Cities, City of Miami, Florida, City of Wheaton, Illinois, Post-Newsweek Cable, Inc., City of Dallas, Texas, et al., Intervenors.

No. 85-1841.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 26, 1986.

Decided March 20, 1987.

Gregory M. Schmidt and Paul G. Gaston, Washington, D.C., entered appearances for intervenor, Ass'n of Maximum Service Telecasters, Inc.

Mitchell Lazarus and David R. Anderson, Washington, D.C., entered appearances for intervenor, Post-Newsweek Cable, Inc.

Before MIKVA, RUTH BADER GINSBURG and SILBERMAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Opinion concurring in part and dissenting in part filed by Circuit Judge MIKVA.

SILBERMAN, Circuit Judge:

This petition calls upon us to consider the authority of the Federal Communications Commission (FCC or Commission) to prohibit states and municipalities (franchisors or

franchising authorities) from imposing upon cable television system operators technical requirements governing cable television signal quality. In October, 1985, the FCC promulgated a rule that both established federal technical standards for cable signal quality and forbade local cable franchising authorities from imposing standards of their own. Petitioner City of New York and various intervenors contend this rule exceeds the preemption authority granted the FCC by the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§521-559 (Supp. II 1984)) (hereinafter "Cable Act"). Petitioner also contends the FCC's failure to address certain objections made during the rulemaking process by several states and municipalities was arbitrary and capricious. For the reasons stated below, we hold the FCC's preemption of local technical standards

for one particular class of cable channels falls within the Commission's statutory authority. However, because the FCC failed to consider the effect of the Cable Act's franchise renewal requirements on the propriety of its preemption of such standards for the other classes of cable channels, the FCC's rulemaking here was, within the meaning of the Administrative Procedure Act, 5 U.S.C. §551 et seq. (1982), arbitrary and capricious.

I.

In the 1960's, the FCC began to address the various regulatory problems created by the rapid development of cable television services. The Commission decided that cable television was best regulated by a "deliberately structured dualism" whereby state and local authorities would grant franchises to cable operators within their communities, while the FCC would retain

exclusive authority over all technical and operational aspects of cable communication. See Cable Television Report and Order, 36 F.C.C.2d 141, 207-210 (1972). Pursuant to that approach, the FCC in 1972 defined four categories of cable television service:

> Class I-Cable channels devoted to delivering standard broadcast television signals;
>
> Class II-Cable channels used for delivering non-encoded "cablecast" programming such as Cable News Network, ESPN, and public, educational, and governmental access programming;
>
> Class III-Cable channels used for delivering encoded cablecast programming such as Home Box Office and other pay channels;
>
> Class IV-Cable channels with two-way transmission capability allowing

subscribers to return information to the control point.

See Cable Television Report and Order, 36, F.C.C.2d at 198-99. The FCC established minimum technical standards of signal quality only for Class I channels, leaving the signal quality of Class II, III, and IV channels unregulated. Id. at 200, 204. Shortly thereafter, however, local franchisors began imposing their own, more rigorous, technical standards as a condition of granting franchises to cable operators. After observing this experiment in local technical regulation for several years, the FCC concluded that allowing local jurisdictions to impose non-uniform technical standards was undesirable because, by subjecting cable operators to divergent and sometimes unworkable demands, this regime undermined the FCC's goal of promoting an efficient and innovative communications service. The

Commission, therefore, promulgated a rule denying franchisors the power to impose technical standards more stringent than the FCC's standards. See Report and Order, 49 F.C.C.2d 470, 477-480 (1974). This regulatory scheme, including the preemption provision, was upheld in later years by the courts, see Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L. Ed. 2d 580 (1984); New York State Comm. on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

Against this backdrop, Congress enacted the Cable Communications Policy Act of 1984 to "clarif[y] the current system of local, state, and Federal regulation of cable television." H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984), U.S.Code Cong. & Admin.News 1984, p. 4655 (hereinafter "House Report"). The Cable Act sought to balance two conflicting goals: "preserv[ing]

the critical role of municipal governments in the franchise process," House Report at 19, U.S.Code Cong. & Admin.News 1984, p. 4656, while affirming the FCC's "exclusive jurisdiction over cable service, and overall facilities which relate to such service...." House Report at 95, U.S. Code Cong. & Admin.News 1984, p. 4732. So, for example, the Cable Act allows local franchising authorities to continue selecting cable franchisees, Cable Act § 621, 47 U.S.C. § 541,[1] and to specify the facilities and equipment cable operators must make available, Cable Act § 624(b), 47 U.S.C. §544(b). Yet the Act also circumscribes

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[1] Section 2 of the Cable Act amended the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1982) ("1934 Act"), by adding a new Title VI, the provisions of which were identified in the Cable Act as sections 601-639. Upon codification, these sections were numbered as sections 521-559 of Title 47 of the United States Code.

franchisors' regulatory authority: franchisors are prevented from regulating the services, facilities, and equipment provided by cable operators "except to the extent consistent with [the Cable Act]." Cable Act §624(a), 47 U.S.C. §544(a).

After the Cable Act's passage, the FCC reexamined its cable regulations. The Commission issued a notice of proposed rulemaking, 50 Fed.Reg. 7801 (1985), suggesting that its 1974 mandatory technical standards be reformulated as "guidelines" that local franchisors could choose to include in franchise agreements. The notice also proposed continuing the FCC's policy of preempting local technical standards that exceed federal standards. Id. at 7802. Approximately 120 comments and letters were generated by the notice, many of them from franchising authorities urging the FCC to either adopt a comprehensive set of

mandatory technical standards or give franchisors the authority to enact such standards. The franchising authorities also argued the FCC's preemption policy was no longer permissible because it was inconsistent with the Cable Act. Other comments, primarily from cable operators, generally supported the FCC's proposal. On October 31, 1985, the FCC adopted its final Report and Order, Technical and Operational Requirements of Part 76 Cable Television, 50 Fed.Reg. 52,462 (1985)(hereinafter Report and Order), relabelling its mandatory technical "rules" for Class I cable channels as "standards,"[2] which franchisors were

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[2] The Commission has used the terms "rules," "requirements," "regulations," "guidelines," and "standards" interchangeably. See, e.g., 50 Fed.Reg. 7801 (1985) ("quality performance standards," "regulations," "technical parameters," "technical rules," "technical

(Footnote Continued)

authorized to include in franchise agreements, but prohibiting franchisors from imposing technical requirements that exceed those FCC standards. The Commission left Class II, III, and IV cable channels completely unregulated and prohibited franchisors from filling this gap, reasoning that competitive forces would encourage cable operators to provide adequate signal quality.

This petition followed. Petitioner City of New York and various intervenors (the National League of Cities, the City of Miami, and the City of Wheaton) raise numerous objections to the rule. Of these objections, we think two merit extended discussion.[3]

(Footnote Continued)
standards," "technical requirements"). In the Report and Order at issue here, the Commission has apparently settled on using the term "standards" to describe its signal requirements.

[3] Intervenor the New York Citizens'
(Footnote Continued)

First, petitioner argues that the manner in which the FCC has sought to preempt franchisors from enacting technical rules

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(Footnote Continued)
Committee for Responsible Media contends that by precluding all technical regulation of Class II channels, the FCC arbitrarily and capriciously overlooked the possibility that cable operators would deliberately provide poor signal quality for public, educational, and governmental access (PEG) channels in an effort to discourage viewers from watching these channels. The intervenor correctly observes that the FCC failed to address this concern in its rule. While the Commission certainly had an obligation to consider all "relevant factors" in this informal rulemaking process, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91, S.Ct. 814, 824, 28 L.Ed.2d 136 (1971), there is also a limit to the potential problems the Commission must consider and discuss in its statement of basis and purpose, see Thompson v. Clark, 741 F.2d 401, 408-409 (D.C.Cir.1984). Purely speculative comments, for example, require no agency response, see Home Box Office v. FCC, 567 F.2d 9, 35 n. 58 (D.C.Cir.1977). The Intervenor's concern evidently struck the Commission as so improbable and speculative, and so lacking any supporting evidence, that it did not merit consideration or acknowledgment. We are likewise unpersuaded that the intervenor's concern required the Commission's explicit consideration.

does not comport with the limitations on its preemption power established in various provisions of the Cable Act. Second, petitioner argues that without a comprehensive set of technical standards covering all four classes of cable channels, franchisors will be unable to fulfill effectively their responsibility to evaluate the quality of the cable signal when considering cable operators' applications for license renewal under section 626 of the Cable Act, 47 U.S.C. §546. Petitioner contends this latter concern was raised during the rulemaking proceeding, yet the FCC arbitrarily and capriciously failed to address it in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982).

The first dispute essentially involves a disagreement about the scope of the FCC's preemption authority in light of Congress'

passage of the Cable Act. "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana Public Service Comm. v. FCC, ___ U.S.___, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986). See also Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). When it considered and passed the Cable Act, Congress legislated against the background of the FCC's longstanding preemption policy-a policy containing two components: minimal FCC standards for Class I channels combined with a ban on more stringent franchisor-imposed Class I standards; and no FCC standards at all for Class II, III, and IV channels coupled with a complete prohibition of any franchisor-imposed standards. The Cable Act contains no provision that expressly

terminates this longstanding preemption policy. Nor does either the statute or its legislative history contain specific indications that Congress disapproved of the FCC's policy. Indeed, the House Report on the Cable Act noted, without any indication of disapproval, the numerous judicial decisions upholding the FCC's authority over cable television, including two decisions, Capital Cities Cable, Inc. v. Crisp, supra at ___, that affirmed the FCC's authority to preempt local technical standards. House Report at 96.

[1] The FCC contends that because the Cable Act did not expressly terminate this preexisting preemption policy, we must infer that Congress intended that entire policy to continue without modification. Petitioner, on the other hand, asserts that in adopting the Cable Act Congress comprehensively restructured the FCC's

regulatory authority over cable television, and because Congress expressly sanctioned certain longstanding FCC regulations, the absence of an explicit endorsement of the Commission's preemption policy indicates Congress intended to terminate that policy.[4] We think both parties' interpretations of congressional intent are unnecessarily extreme. Since Congress legislated against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation, we infer that Congress endorsed

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[4] Petitioner argues that Congress dealt with the FCC's concern about franchisors imposing unreasonably stringent technical standards, and thus displaced its preemption regulation, by including section 625(a)(1)(A), 47 U.S.C. § 545(a)(1)(A), which provides that a cable operator may seek modification of his franchise agreement if that agreement contains "commercially impracticable" provisions. But this procedure leaves to the determination of the many franchisors what is or is not "commercially impracticable," and therefore hardly obviates the Commission's concern.

it, except where the Cable Act explicitly or implicitly modified its provisions.

To determine whether Congress intended to modify the FCC's prior preemption regulation we look first to the express language of the statute. In section 624(b)(1) of the Cable Act, Congress delegated to franchising authorities the right to "establish requirements for facilities and equipment" provided by a cable operator, 47 U.S.C. § 544(b)(1).[5] But section 624(a) provides that a "franchising authority may not regulate the services, facilities, and

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[5] The FCC contends that section 624(b)(1) only grants franchisors authority to specify generically the composition and configuration of the cable system (e.g., number of broadcasting studios, cameras, remote transmission vans, and satellite earth stations), and not the technical parameters of the cable signal. Under the Commission's interpretation of section 624, only the Commission may establish technical standards.

equipment provided by cable operator except to the extent consistent with [the Cable Act]," 47 U.S.C. § 544(a) (emphasis added), thus clearly limiting a franchisor's freedom of action. And section 624(e)--"The Commission may establish technical standards relating to the facilities and equipment of cable systems...," 47 U.S.C. §544(e) (emphasis added), -indicates the authority to curtail that freedom of action was delegated to the FCC, at least insofar as the FCC's "technical standards" overlap the franchisors' specifications of certain "services, facilities and equipment." The only item of legislative history bearing on the meaning of section 624(e) is consistent with that interpretation: "[T]his provision [section 624(e)] does not affect the authority of a franchising authority to establish standards regarding facilities and equipment ... which are not inconsistent

with standards established by the FCC under this subsection." House Report at 70, U.S. Code Cong. & Admin.News 1984, p. 4707 (emphasis added).

The FCC interprets the House Report phrase "not inconsistent with" as authorizing it to preempt any franchisor standard that "exceeds" the FCC's own standard. Petitioner argues, however, that "not inconsistent with" means "not contradictory." In other words, petitioner contends the Cable Act permits franchisors to require technical standards more onerous than the Commission's standard so long as no part of the franchisor's standard makes it impossible for the cable operator to comply with both the franchisor's and the FCC's specifications. Since the FCC's standards for Class I channels regulate only four of apparently twenty-four possible technical parameters that directly affect signal

quality, see 47 C.F.R. §76-605(a)(7)-(10) (1985), petitioners assert they should be permitted to regulate any technical parameters the FCC left untouched.

We think the words "not inconsistent" are susceptible to both interpretations. Oxford's English Dictionary defines "inconsistent" as "not in accordance," 5 THE OXFORD ENGLISH DICTIONARY 173 (1973); Webster's defines it as "incompatible," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1144 (1971); and Black's prefers the definition "contradictory," BLACK'S LAW DICTIONARY 689 (5th ed. 1979). Normally, we would be obliged by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to defer to an agency's interpretation of an imprecise statute if Congress has not manifested a contrary intent in the legislative history.

Here, the Chevron doctrine would apply a fortiori because the dispute centers on ambiguous language of a committee report which in turn describes general statutory wording. But whether Chevron deference is required in, or appropriate to, judicial review of an agency's assertion of preemption authority is unsettled. In Louisiana Public Service, supra at 724, a post-Chevron case in which the Supreme Court considered the Commission's exercise of preemption pursuant to imprecise statutory authority, Justice Brennan did not mention Chevron, 106 S.Ct. at 1898-1904. Yet in Crisp, supra at 723, decided only one week before Chevron, the Court upheld the FCC's decision that its general grant of regulatory authority under the 1934 Act to promote a "rapid, efficient" communications service permitted it to preempt state cable signal regulations. Justice Brennan, again

speaking for the Court, reasoned that the Commission's preemption decision "plainly represents a reasonable accommodation of the competing policies committed to the FCC's care, and we see no reason to disturb the agency's judgment." 467 U.S. at 708, 104 S.Ct. at 2705. But see dissent at 729.

[2] We do not need to decide whether deference is warranted, however, since we believe the FCC's interpretation of "inconsistent" the more persuasive. When it passed the Cable Act, Congress focused on the FCC's existing policy--just approved by the Supreme Court in Crisp--of preempting local cable technical standards, see supra at 724. But neither the Act's language nor any other piece of legislative history suggests Congress' intent to modify the FCC's past practice--at least with respect to Class I channels. But see dissent at 730-731. Petitioners thus place more weight on the

phrase "not inconsistent with" than, without further support, it will bear.[6] The FCC's decision to preempt franchisors' technical regulations with its own Class I technical standards, minimal though they may be, cannot be said to exceed its statutorily delegated preemption authority; that broad authority allows the Commission to decide, as it did in this case, that a certain level of regulation is all that is desirable.[7]

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[6] The dissent's contention that the FCC's position "cynically" eliminates all franchisor authority under the Cable Act, dissent at 730, seem hyperbolic. Continuing authority to award franchises, see supra at 730, and to specify facilities and equipment, see note 5, supra, is unchallenged. Moreover, it is certainly possible--we do not decide--that franchisors may regulate signal quality if the FCC declines either to impose its own standards or to invoke its preemption authority.

[7] Petitioner also contends that, preemption aside, it was arbitrary and capricious of the FCC not to reexamine and update its cable signal standards in the face of comments
(Footnote Continued)

A more difficult question is presented by petitioner's argument that the FCC cannot preempt franchisors' regulation of Class II, III, and IV channels without adopting any standards governing those channels.[8] To

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(Footnote Continued)
asserting these standards were out of date. But, as petitioner concedes, the Commission did review and modify certain technical requirements in response to comments, Report and Order at 52, 465. The Commission's decision not to modify other requirements is a matter surely entitled to great deference, see WWHT, Inc. v. FCC, 656 F.2d 807, 816-18 (D.C.Cir.1981), that we see no reason to challenge.

8 The Commission has acknowledged the signal quality of Class II, III, and IV channels remains completely unregulated under the rule, see Report and Order at 52,463 & n. 4. At oral argument, however, the FCC's counsel contended that Class II, III, and IV channels are implicitly incorporated within the Class I technical standards because signals for each class of channels must be transmitted through one "tube" whose characteristics are regulated by virtue of the Class I standards. We cannot examine the Commission's position in light of appellate counsel's "post hoc rationalizations," see Investment Co. Institute v. Camp, 401 U.S. 617, 628, 91
(Footnote Continued)

reject that argument squarely, we would be obliged to adopt the FCC's position that section 624(e) was, in this respect, designed to affirmatively endorse the FCC's entire past policy--permitting only the market-place to govern the development of cable transmission quality. We are not required to resolve this question either, however, since we agree with petitioner's alternative argument that the FCC's failure to adopt standards for Class II, III, and IV appears in conflict with section 626 of the Cable Act and, absent consideration of the apparent conflict, its rulemaking was arbitrary and capricious.

(Footnote Continued)
S.Ct.1091, 1097, 28 L.Ed.2d 367 (1971) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168-69, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)), and therefore must look to the Commission's own representations.

Section 626 sets forth the procedure franchisors are to follow for renewing cable licenses and describes the bases upon which franchisors may conclude that renewal either is or is not warranted. Section 626(c)(1) provides that when a cable operator applies for renewal of a franchise, the franchising authority must either renew the franchise or preliminarily deny the application and, upon request, begin a public administrative proceeding to determine whether the cable operator's franchise ought to be renewed. The franchising authority is required to consider four factors when making such a determination, one of which is whether "the quality of the operator's service, <u>including signal quality</u>, response to consumer complaints, and billing practices ... has been reasonable in light of community needs." Cable Act § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (emphasis added).

When doing so it must follow familiar requirements of administrative due process.[9] If the authority denies a franchise renewal after a public administrative proceeding, that denial must be based on an "adverse finding" on, for example, the poor signal quality factor described above, Cable Act § 626(d), 47 U.S.C. § 546(d). In that event, the operator may bring suit in state or federal court alleging that the franchisor's failure to renew was improper, Cable Act §§ 626(e)(1), 635(a), 47 U.S.C. §§ 546(e)(1), 555(a). The court may grant "appropriate

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[9] The franchisor must introduce, and allow the cable operator to introduce, evidence into the record; the franchising authority and the operator may question witnesses; a transcript of the proceeding must be prepared, Cable Act § 626(c)(2), 47 U.S.C. § 546(c)(2); and, at the conclusion of the proceeding, the franchising authority must issue a written decision granting or denying the renewal based upon a record that states the reasons for the decision, Cable Act § 626(c)(3), 47 U.S.C. § 546(c)(3).

relief" if the franchising authority's finding of poor signal quality is "not supported by a preponderance of the evidence," Cable Act § 626(e)(2)(B), 47 U.S.C. § 546(e)(2)(B).

[3] The Cable Act thus requires franchisors to consider the quality of a cable operator's signal when considering his renewal application. And a franchisor's determination that the operator's signal quality has been inadequate must be the product of reasoned decisionmaking. Petitioner argues that franchising authorities cannot evaluate reasonably a cable operator's signal quality without referring to objective technical standards; otherwise franchising authorities and cable operators alike would be cast into an endless series of subjective disputes over whether the section 626 renewal criterion of "signal quality" has been satisfied. We agree. The FCC's refusal to enact technical standards for Classes II, III,

and IV, combined with its policy of forbidding franchisors from doing so, seems to put franchisors in a "Catch-22" position.

Several parties to the FCC's rulemaking proceeding brought this problem to the Commission's attention,[10] yet its Report and Order contains not a word about section 626.[11] Although an administrative agency

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[10] To be sure, this was not the major focus of the franchising authorities' objections to the FCC's proposed rule. Yet the problem was raised by at least three different parties on four separate occasions. Although the FCC argues that it has no obligation to respond to each and every comment made during rulemaking, it does not contend that this objection was improperly raised.

[11] The FCC now contends that petitioner's concerns about the rule's effect on franchisors' renewal obligations are unfounded. Counsel for the Commission argues that franchisors can evaluate an operator's signal quality without reference to objective standards merely by bringing to the operator's attention consumer complaints about poor signal quality and asking the operator for an explanation. If the operator has no "satisfactory" explanation, the

(Footnote Continued)

certainly has no obligation to consider every comment raised during an informal rulemaking, it must nevertheless consider all "relevant factors," see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). Since the FCC's rule appears to make it impossible for franchising authorities to fulfill conscientiously the renewal procedures imposed on them by section 626 of the Cable Act, the "relevance" of this consideration can hardly be questioned.

(Footnote Continued)
franchisors can safely deny the renewal. We cannot accept this argument. It begs the question of what is a "satisfactory" explanation -- perhaps this can only be determined with reference to objective standards of satisfactory signal quality. More importantly, the Commission did not explicitly base its rulemaking on this position; it is instead merely a post-hoc rationalization offered by appellate counsel to which we cannot defer. See Investment Co. Institute v. Camp, 401 U.S. 617, 628, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971).

Indeed, the apparent incompatibility between the FCC's rule and section 626 calls into question whether Congress intended that the Commission have the authority to preempt franchisors' signal quality standards and replace them with no standards at all--Congress' decision to require an objective assessment of cable operators' signal quality strongly suggests it intended someone, either the FCC or the franchisors, to establish objective standards for Class II, III, and IV channels. The Commission's use of its preemption authority to prohibit the enactment of such standards, then, may well have been in excess of its statutory authority. Still, without an adequate explanation from the FCC of the effect of section 626 on its preemption authority, we cannot (and do not) make this determination. In any event, the FCC had an obligation explicitly to consider the interrelationship

between sections 626 and 624. That it chose not to makes its rulemaking here defective. See Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847, 854 (D.C.Cir., 1987) (agency's failure to discuss how rule squares with statute's objective is arbitrary and capricious). We, therefore, vacate the FCC's rule as it relates to Class II, III, and IV channels and remand the case to the Commission for further proceedings consistent with this opinion.

So Ordered.

MIKVA, Circuit Judge, concurring in part and dissenting in part:

The court has struck down an attempt by the Federal Communications Commission to forbid local cable franchising authorities from imposing technical standards on Class II-IV cable channels. I concur in the majority's finding that with regard to these channels, the Commission improperly failed to consider

the apparent incompatibility of its rule with section 626 of the Cable Act. Majority Opinion at 726-728. The court has upheld, however, the Commission's decision to preempt the local authorities from playing any meaningful role in regulating the signal quality of Class I channels. Id. at 724-726. The decision forces local authorities not to exceed federal guidelines that even the Commission has conceded are threadbare and outmoded. The majority recognizes that the Cable Act and accompanying legislative history do not clearly authorize the Commission's exercise of preemptive authority. Id. at 725. The majority nevertheless accedes to the Commission's interpretation. In my view, that interpretation is fanciful. More importantly, I believe the majority commits a serious error, and departs from established doctrine, in sanctioning preemption in the

absence of a clear congressional mandate. I therefore dissent from that part of the majority opinion.

Preemption of local sovereignty by higher federal authority has always been a serious strain on our concept of federalism. While the Constitution clearly gives Congress the power to ordain preemption in those areas where Congress is empowered to act at all, the power has been used wisely when it has been used sparingly. As Justice Harlan has reminded us, "one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental laboratories." Roth v. United States, 354 U.S. 476, 505, 77 S.Ct. 1304, 1320, 1 L.Ed.2d 1498 (1957) (Harlan, J., concurring and dissenting). Consistent with this principle, the Supreme Court has counseled repeatedly that a finding of preemption is appropriate only in the face of

a clear manifestation of congressional intent. See Chicago & Northwestern Transportation Co. v. Kalo Brick and Tile Co., 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'") (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)); Schwartz v. Texas, 344 U.S. 199, 202-03, 73 S.Ct. 232, 234-35, 97 L.Ed. 231 (1952) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.") Most

recently, the Court has reminded us that "[i]n determining whether a state statute is pre-empted by federal law ... our sole task is to ascertain the intent of Congress." California Federal Savings & Loan v. Guerra,___ U.S. ___, ___, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (emphasis added).

The majority's consideration of the preemption issue ignores these cautionary signals. Instead of conducting a rigorous examination of whether Congress has unmistakably ordained preemption, the majority concludes, on slender evidence, that the Commission's interpretation is the "more persuasive" reading of "ambiguous language," maj. op. at 726, and considers its inquiry satisfied. The majority also suggests that it may be appropriate for a court to defer to an agency's assertion of preemptive authority under the teachings of

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The suggestion is alarming. An agency's assertion of federal preemptive authority is not equivalent to an agency's adoption of a rule to fit its statutory mission and cannot be an occasion for Chevron-style deference; rather, in administrative law no less than in other areas, preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522, 101 S.Ct. 1895, 1905, 68 L.Ed.2d 402 (1981). In Chevron, the Supreme Court recognized the necessity of deferring to agency interpretations when Congress purposely has left a gap in the statute or has expressed no clear intent on the particular issue. 467 U.S. at 843-45, 104 S.Ct. at 2781-83. The

teachings of the preemption cases, by contrast, suggest that in cases of statutory ambiguity or congressional silence it is critical not to assume Congress intended to preempt. Congress of course may delegate to an agency the power to issue certain preemptive regulations, if Congress does so in no uncertain terms. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984); Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153-54, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664 (1981). This is not the same, however, as saying a court should defer to an agency's claim that Congress has in fact withdrawn the capacity of the states to act.

The Louisiana Public Service case cited by the majority is an instructive example, both because it was heard after Chevron and because it involved a claim of preemptive

authority by the FCC. See Louisiana Public Service Comm. v. FCC, ___ U.S. ___, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). (Significantly, the Louisiana Public Service opinion does not even mention Chevron.) In the face of the preemptive claim by the Commission, the Court re-emphasized that "the critical question in any preemption analysis is always whether Congress intended that federal regulations supersede state law." Id. at 1899. The Court acknowledged that the statute in question contained some "internal inconsistencies, vague language, and areas of uncertainty." Id. at 1904. Since the statute was ambiguous, under a Chevron analysis any reasonable agency interpretation should have been upheld, and the Court indeed indicated that the FCC's position was reasonable. Id. at 1903. ("[I]t is, no doubt, possible to find some support in the broad language of the section for

respondent's position.") However, the Court gave no deference to the agency's interpretation, and it rejected the FCC's claim of preemptive authority. The case thus indicates that in the context of agency assertions of preemptive authority, the proper focus of inquiry is not whether an agency reasonably could conclude Congress intended to preempt but whether Congress in fact unmistakably so intended.

I do not pretend that the issue is entirely one-sided. At the very least, however, the question of whether to defer to an agency interpretation of preemptive authority brings into conflict two lines of teaching and the policies that underlie each. My appraisal of the conflict would be that the federalism concerns at the heart of preemption doctrine are far more compelling than the separation-of-power concerns at the heart of Chevron jurisprudence.

I also believe the Commission's position does not hold up to even deferential scrutiny. As the majority points out, a provision of the House Report contains Congress's most direct statement concerning whether the Cable Act permits states to promulgate technical standards more stringent than those established by the FCC. The provision read, "[Section 624(e)] does not affect the authority of a franchising authority to establish standards regarding facilities and equipment ... which are not inconsistent with standards established by the FCC under this subsection." House Report at 70, U.S. Code Cong. & Admin. News 1984, p. 4707. I cannot agree that this provision is susceptible to the interpretation the FCC urges. The Commission's interpretation, under which federal standards install a ceiling on state regulation, is at odds with the dictionary

definition of "inconsistent": more stringent local standards are neither "incompatible," in the sense of incapable of coexistence, see Webster's Third International Dictionary 1144 (1981), nor are they "mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other." Black's Law Dictionary 689 (5th ed. 1979). More important, the Commission's interpretation is at odds with common sense. It is clear that once the Commission establishes federal standards for technical quality under 624(e), local franchisors must adhere to them. To say that local franchisors have no authority to impose more stringent standards is to say they have no authority at all, because less stringent regulations only track already binding federal requirements. The Commission's

interpretation therefore degrades the House Report's statement of clear intent to preserve state authority into mere lip-service. I cannot endorse the cynical and illogical position that Congress was "protecting" states' authority to issue only redundant regulations to which franchisors already would be bound.

The majority strains to justify its decision by arguing that it still recognizes the states' ability to exercise certain authority, such as the authority to award franchises. Maj. op. at 726 n. 6. The issue, however, is not whether the opinion denies local forces any role whatsoever in cable regulation. The Committee Report expressly protects the states' exercise of a specified kind of authority, namely the authority "to establish standards regarding facilities and equipment." The majority opinion plainly emasculates that guarantee.

The sole evidence the majority offers for preferring the Commission's interpretation is that "Congress legislated against the backdrop of the Commission's pre-existing preemption regulation without criticizing that regulation." Maj. op. at 725. This kind of argument is rarely conclusive, all the less so in an area where the Supreme Court has required clear manifestation of congressional intention. In this case, it is even more specious. The Cable Communications Policy Act of 1984 was Congress's seminal effort to fashion a comprehensive policy for the cable industry. See House Report at 23. Existing regulatory schemes, conceived in cable's infancy or before, were inadequate to the burgeoning industry. Since Congress was constructing from the ground up, it is incongruous to presume it intended to preserve all elements of the previous makeshift approach unless it

specifically disclaimed them. If anything, the opposite presumption--that Congress intended to preserve only those prior policies it expressly endorsed--is the more logical one. Indeed, certain provisions of the Act specifically codify past Commission policies. See, e.g., House Report at 56 (specifying that Section 613(a)(1) codifies Commission's television/cable cross-ownership ban).

The majority opinion fails to heed Supreme Court teachings on preemption, doing violence to some important notions of federalism and preemption that have served our republic well for some 200 years. Moreover, the majority accedes to a Commission interpretation that flatly contradicts the relevant legislative history. From such mischief, I dissent.

FCC REPORT AND ORDER UNDER REVIEW

47 CFR Part 76

[MM Docket No. 85-38; FCC 85-587]

Technical and Operational Requirements of Part 76 Cable Television

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action revises technical signal quality standards for cable television. These standards were established in 1972, when the cable industry was in its early stages of development. Since that time, the industry has matured, and competition has grown. In view of that fact, the purpose of this action is to relax and to better relate these quality standards to marketplace development.

EFFECTIVE DATE: January 23, 1986.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Bernard Gorden, Mass Media Bureau, (202) 632-9660.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 76

Cable television.

Report and Order

In the matter of review of the technical and operational requirements of Part 76, Cable Television; MM Docket No. 85-38.

Adopted: October 31, 1985.

Released: December 17, 1985.

By the Commission: Chairman Fowler concurring and issuing a statement.

Introduction

1. By this Report and Order, the Commission is amending its rules concerning technical and operating requirements for cable television systems. We hereby change

the existing rules into standards. These standards may be applied but not exceeded by franchise authorities in the regulation of the technical quality of Class I (broadcast) channels by cable television systems. Enforcement of all such standards by the Commission is eliminated. The decision as to whether such standards should be used and how they should be administered is left to local and state regulatory authorities. This decision reflects the Commission's belief that in an increasingly competitive marketplace there is a reduced need for detailed regulation of technical quality specifications. The decision, however, leaves local regulatory authorities discretion, in accordance with the provisions of section 624(e) of the Cable Communications Policy Act of 1984 (1984 Cable Act), to address technical quality issues. Authority of municipal and state regulators to establish

requirements for "facilities and equipment" in accordance with section 624(b) of the Cable Act is unaffected by this decision. Certain changes in the cable television signal leakage rules that were proposed in the Notice in this proceeding have not been adopted but will be addressed separately at a later date.

Background

2. The present cable technical rules are set forth in Subpart K of Part 76 of the Commission's rules. These rules were adopted in the Cable Television Report and Order.[1] The rules specify numerous technical performance criteria and requirements for annual performance tests. The technical standards contained in §76.605 include:

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[1] 36 FCC 2d 143 1972.

(1) The frequency boundaries of cable television channels delivered to subscriber terminals; (2) the frequency tolerance of CATV visual carriers; (3) the frequency tolerance of CATV aural carriers; (4) the minimum visual carrier levels at subscriber terminals; (5) the allowable tolerance for visual carrier level variations within 24 hours; (6) the maximum and minimum aural carrier specifications with respect to visual carrier levels; (7) the maximum allowable level of visual low frequency distortion; (8) the frequency response of each channel; (9) the allowable visual signal-to-system noise level and to any undesired co-channel signal; (10) the allowable level of intermodulation distortion; (11) the minimum amount of isolation between subscriber

terminals; and (12) requirements regarding signal leakage.[2]

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[2] At the time of their adoption in 1972 these standards were referred to as "minimum" standards which caused some confusion at that time and some of that confusion has continued to the present. See 49 FCC 2d 470, para 5 (1974). The standards are minimum in that they describe a level of service that must be delivered to subscribers at even the worst locations on a system. This necessarily means that most subscribers, including in particular those closer to the system headend, will receive service that is superior to this minimum. It has also been noted that the standards have been referred to by the Commission itself as incomplete. It was for this reason that the Commission created the Cable Television Technical Advisory Committee in 1972 to provide advice on possible changes to the standards. The work of this Committee led to some changes in the standards. Other changes were not made, however, as it was becoming increasingly clear that the technical interrelationships between the standards involved were extremely complex and that commercial incentives were driving the industry in the same direction as the recommended standards but with both greater force and greater flexibility than could be accomplished with more detailed regulatory requirements. The standards, however, remained valid as a means of defining an acceptable quality of service at

(Footnote Continued)

3. In adopting the 1972 rules, the Commission was explicit that its standards were not intended to place any barrier in the way of franchising authorities adopting "more stringent technical standards." Reconsideration of Cable Television Report and Order, 36 FCC 2d 326, 359-60 (1972). This policy did not succeed, however, and in 1974, the Commission adopted the current preemption policy.[3] This policy prohibits state and local technical regulations for Class I signals that are inconsistent with those

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(Footnote Continued)
the worst subscriber location and thus a better quality of service to the average subscriber. Suggestions that new standards be adopted were received informally in this proceeding. Specific recommendations were not included, however, and this was not, in any case, the focus of this proceeding.

[3] See Report and Order in Docket 20018, 49 FCC 2d 470 (October 22, 1974).

adopted by the Commission.[4] In addition, our preemption policy bars any state and local technical regulation for non-Class I signals. This policy was instituted to ensure the growth of cable services and cable-related technology and to avoid the detrimental impact on cable service and technical innovation in the cable industry that would have resulted from the necessity for system operators and equipment manufacturers having to design and comply

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[4] Class I channels are television channels received off-the-air or obtained by the cable operator via microwave or direct connection to the television broadcast station. Class II to IV channels are other types of signals that may be provided by a cable system. For example, signals that require an auxiliary decoder, such as most pay cable services, are defined as Class III channels. The Commission's technical performance standards and requirements have traditionally applied only to Class I cable television channels. See 47 CFR 76.5 (t), (u), (v), and (w).

with numerous different and potentially conflicting standards.

4. On February 12, 1985, the Commission adopted the Notice of Proposed Rule Making in this proceeding.[5] The Notice proposed revision of certain rules in Subpart K of Part 76 of the Commission's Rules and Regulations. The Notice requested comments on the need for cable television subscriber signal quality standards and on the appropriate level of cable signal leakage limits.

5. In response to the Notice, the Commission received comments from 50 parties and reply comments from 20 parties. In addition, approximately 70 individual letters were received from cable TV subscribers, amateur radio groups and

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5 50 FR 7801 (February 26, 1985).

operators.[6] The vast majority of the letters received were concerned with cable signal leakage requirements.

Discussion

Technical Quality Performance Standards

6. Federally Enforced Standards. In the Notice, we indicated our belief that competitive forces are sufficient to ensure adequate signal quality for the provision of cable service. Accordingly, we proposed to delete the technical standards for Class I signals from the rules and, alternatively, publish them as guidelines in an Office of Science and Technology bulletin. We indicated in the Notice that franchise authorities could use these guidelines in their franchise agreements with the cable

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[6] A list of commenters appears in Appendix B.

operator. We also stated that the imposition of technical quality standards more stringent than those in the guidelines would be considered inconsistent with our national policy and would not be permitted.

7. The National Cable Television Association (NCTA), Capital Cities Cable, Inc., and other cable system operators generally support the proposed elimination of the present signal quality standards for Class I signals. They agree with the Commission that competition from alternative video sources now provide cable operators with sufficient incentives to maintain technical signal quality.

8. Other commenters assert that the market forces do not provide sufficient incentives for cable systems to deliver quality signals. In particular, commenters representing State and local governments argue that cable systems generally have

monopoly-like powers, and therefore, cannot be relied upon to ensure satisfactory cable signal performance. The State of Hawaii, for example, expresses concern that cable systems will not maintain acceptable technical quality and reliability unless required to do so. In addition, some commenters, such as the National Association of the State Cable Agencies (NASCA), make reference to the recent Commission proceeding that implemented the Cable Communications Policy Act of 1984.[7] That proceeding, among other matters, defined effective competition for the purpose of rate regulation of basic cable service. NASCA assets that the Commission's decision on effective competition

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[7] See Report and Order in Docket 84-1296, 50 Fed. Reg. 18637 (May 2, 1985): See also Cable Communications Policy Act of 1984, Pub. L. No. 96-549, Sec. 1 et. seq. 98 Stat. 2779 (1984).

should be taken into account in determining whether to deregulate technical standards. Other commenters note that performance would most likely deteriorate in areas where over-the-air reception is already poor.

9. The process of governmental standards setting, in highly complex and evolving fields, carries with it significant risks. Extremely sophisticated economic and technical tradeoffs in a changing environment must be made in order to satisfy consumer demands in an economically sustainable fashion. Standards setting organizations are necessarily removed from this function and react to change in a manner and through processes that invite delay. Nevertheless, there are many areas in which the standard setting function cannot be avoided. In adopting standards in the cable field, the historical record reflects little discussion of whether and in what situations standards

could effectively advance the interests of consumers.[8] Recently the Commission recognized that a more rigorous analysis of

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[8] In the middle 1960s broadcast interest sought the adoption of such standards for a cable industry which, at the time, still operated on a tube rather than transistor technology. See Notice of Inquiry and Notice of Proposed Rule Making in Docket 15971, 1 FCC 2d 453, para. 62 (1965). The Commission later declined to adopt specific quality standards. First Report and Order in Dockets 14895 et al., 38 FCC 683, para. 130 (1965), and then in 1968 raised the issue again stating only that such standards should be considered "to further high quality service to the public" and to promote "compatibility among systems for purposes of interconnection." Notice of Proposed Rule Making in Docket 18397, 15 FCC 2d 417, para 29 (1968). More specific proposals were made in 1970, again with the statement that the standards would further the quality of service received by the public. Notice of Proposed Rule Making in Docket 18894, 25 FCC 2d 38, para 13 (1970). The standards proposed were adopted in 1972 with the sole discussion of their need consisting of a statement that the standards would "provide much needed uniformity on a nationwide basis yet still allow sufficient flexibility for technical change." Cable Television Report and Order, 36 FCC 2d 143, para. 149 (1972).

the areas in which it can play a positive role in standard setting is desirable. In addressing this broad general issue in Docket 83-114, the Commission found it useful to focus on four rationales relating to technical standards regulation: (1) Interference, (2) spectrum efficiency, (3) interoperability, and (4) technical quality. Interference and spectrum efficiency considerations were judged to warrant the highest priority as to the need for regulatory action. Interoperability was also found to be of high priority, varying, however, depending on the particular service involved. In contrast, technical quality matters were generally found not to require regulation in those services that were considered to be sufficiently competitive.[9]

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[9] Report and Order in Gen. Docket 83-114, (Footnote Continued)

10. Having reviewed the cable television technical standards against this background and in light of the comments in this proceeding, it is our view that the primary determinants of the quality of service that will be provided are the technical state of the art, the underlying economics of the industry, and the market incentives and competitiveness of the markets involved. The state of the art has clearly advanced to the point where a very high

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(Footnote Continued)
99 FCC 2d 903 (1964). The Report and Order stated that "the pressure of competition and consumer choice have brought about a generally higher level of technical quality than required by our rules." (footnote omitted). It is worth noting in this context that detailed governmental standard setting efforts in complex technical areas have generally been eschewed even in areas where franchised monopolies are involved. In the telephone industry, for example, the function of setting detailed quality of service specifications has been principally performed by the carriers themselves rather than by governmental agencies.

level of service can be provided. The economic situation varies greatly depending on local circumstances, but, if not unduly burdened, an economic base for high quality service appears to exist in all but the more rural areas of the country. And, as we have discussed in other contexts,[10] and as Congress has recognized through passage of the 1984 Cable Communications Policy Act of 1984, cable television systems operate in an increasingly competitive environment. Given these factors we are persuaded that in the vast majority of situations the severe penalties that will be imposed in the marketplace for those operations that do not perform satisfactorily far exceed and can safely be used to replace FCC penalties that

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[10] See e.g., Report and Order in MM Docket 84-1296, 50 F.R. 18637 (1985) (Implementation of Cable Act).

might be imposed through the regulatory process. Given the authority, described below, that will remain in state and local regulatory authorities to adopt technical standards, we conclude that federally enforced standards are no longer necessary or desirable.

11. State and Local Standards. Notwithstanding this decision we continue to believe that there is an important role for the Commission to play in this area. Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the Notice to retain technical standards guidelines at the federal level which could be used, but could not be

exceeded, in state and local technical quality regulations.

12. In their comments, cable interests assert that the franchising authorities are primed to reinstitute excessive technical standards if the Commission abandons its preemption policy. They note the comments from some franchising authorities which challenged the adequacy of the Commission's current technical standards. The cable operators suggest that such comments are indicative of an inappropriate and excessive regulatory attitude that is prevalent at the local level.

13. Comments filed by local government interest groups oppose Federal preemption of signal quality standards, stating that under the Cable Act, the Commission lacks authority to preempt non-Federal technical regulation. These groups argue that section 632 of the 1984 Cable Act which authorizes

franchising authorities to adopt and enforce customer service provisions and construction-related requirements implicitly authorizes local authorities to adopt non-Federal technical quality standards for cable television.

14. After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This preemption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted.

15. The video products that cable systems sell and the processing and transmission equipment used in the construction of cable systems are overwhelmingly associated with national markets that can be severely burdened by disparate and conflicting local regulations and standards. Cable systems now operate in more than 18,500 different communities. There can be no doubt that suppliers of cable service and equipment, in the absence of national standards, face a wide array of different operating requirements. The cost of keeping track of and complying with numerous different requirements is undeniably significant and there appear to be few if any countervailing benefits associated with such disparate requirements.

16. More important, however, is the potential detrimental impact of such standards on technological innovation in the

industry. The problem is not hypothetical. One relatively recent example of the potential problems involved, from our own experience, involved the development of "baseband" cable converters (see note 16 below). Cable systems distribute NTSC picture format video. This format involves a complex interlinking of the various components of the video signal, including the sound, picture, and color components. The baseband technology, which makes possible increased flexibility and security in the delivery of cable services, involves unassembling and reassembling these components in a way that potentially conflicts with traditional standards designed to assure reception of a quality video picture service. The service delivered, however, is of good quality and baseband converters are now being used in connection with many modern high capacity cable systems, notwithstanding that such

devices were not developed until the early 1980s. The obstacles that would be created to such innovation were it necessary to win the approval of numerous franchise authorities before use was possible would be most formidable, even if local authorities were equipped to respond to the sophisticated technical issues involved. The possibilities are evident of similar problems being created as efforts are made to improve the quality and fidelity of television through high definition or quasi-high definition techniques, to add greater communications capacity through greater use of subcarriers and the vertical blanking interval, or to develop other innovations. Such obstacles burden the delivery of interstate communications service, are not necessary to the fundamental objectives of local cable franchising, and are inconsistent with the congressional intent that competition in cable

communications be promoted and that "unnecessary regulation that would impose an undue economic burden on cable systems" be minimized.[11]

17. Section 624(e) of the 1984 Cable Act appears to specifically anticipate the continuation of our existing policy. It specifies that the "Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in a franchise." Contrary to the opinions of some commenters, we find nothing in the legislative history that suggests Congress did not approve of the existing policy or that it intended to limit our ability to

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11 Communications Act of 1934, as amended, section 601(6).

continue it.[12] The policy is fact wholly consistent with the Cable Act's intent to establish a national policy that encourages the growth and development of cable television services.[13] The legislative history indicates that franchising authorities are limited to establishing only those standards "which are not inconsistent with standards

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[12] Some commenters asserted that because Section 632 of the Cable Act authorized franchising authorities to adopt and enforce customer service provisions and construction-related requirements, it would implicitly authorize the adoption of non-Federal technical quality standards for cable television. We find nothing in the Cable Act or in its legislative history supporting that assertion. Furthermore, in Docket 20018, the Commission made it clear that the preemptive policy applied only to objective technical standards, i.e., standards that dealt only with shaping amplification, purity, etc., of signals carried in cable systems. We have never preempted in such areas of local concern, as studio capacities, electrical safety codes, or construction requirements.

[13] See H.R. Report 96-934, 98th Con., 2d sess. 70 (1984).

established by the FCC." On this basis, we believe that Congress intended for the Commission to have authority to oversee technical policy. Further, Congress specifically prohibited local governments from enforcing technical regulations that are inconsistent with Federal policy.[14]

18. In summary, we find our existing preemption policy has furthered the growth and development of cable television service and should be continued, that nothing in the

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[14] It is well established that a clearly articulated policy of deregulation provides a clear basis for federal preemption of inconsistent state regulation. See, e.g., New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984); Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1978); Earth Satellite Communications, Inc. 95 FCC 2d 1223 (1983), recons. denied, FCC 84-206 (May 14, 1984), aff'd sub nom New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984). See generally Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141 (1982).

Cable Act limits our authority with regard to technical regulation of cable systems, and that nothing in the statute or its legislative history indicates that Congress intended to alter our 1974 preemption policy in this area.[15]

Review of Standards

19. Two issues regarding the modified approach to technical deregulation deserve more specific attention. First, a few franchise authorities were exempt from our 1974 preemption policy. That grandfathering provision will continue. Second, for those franchise authorities that want to enforce the Commission's rules and do not have the rules in current franchise agreements, the rules may be enforced at franchise renewal time in accordance with the provisions of the Cable

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15 See 46 FCC 2d 175.

Act. Subsequent agreements will have to contain the rules or the rules will not apply. In the interim, the Commission's rule provisions remain a standard that is available to judge the implicit franchise obligation to provide service to the cable consumer that is of acceptable quality. A number of commenters suggested changes to the current technical requirements. After review of the record, we concur that some adjustments to our technical rules is appropriate for Class I signals.

20. The General Electric Co. (GE) and Zenith Electronics Corp. (Zenith), in their comments, suggest a relaxation of the aural center frequency requirement contained in § 76.605(a)(3) of the rules. They suggest that the requirement that the aural carrier be 4.5 MHz$^{+}_{-}$1kHz above the frequency of the visual carrier should be changed to 4.5 MHz$^{+}_{-}$5kHz. GE and Zenith contend that

many commercially available baseband converters create potential problems under the existing aural carrier specifications and that such a change would not degrade signal quality at the subscriber's televisions set. We agree with the commenters that this variance could be changed without affecting signal quality. Therefore, we are relaxing the tolerance of the aural center frequency of ±15kHz.[16]

21. A further review of the current rules focused on the requirement that the aural signal voltage be maintained between 13

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16 See Viacom Cable Television of Wisconsin, Inc., 50 RR 2d 1558 (1982). In that order the Commission permitted Viacom to use, under certain conditions, decoders in its cable systems which did not meet the standard aural frequency specifications set forth in § 76.605(a)(3) of the Rules. This action was taken under § 76.605(b) of the rules which makes special provisions for cable systems "using multiple cable techniques or specialized receiving devices."

and 17 dB below the associated visual signal level, or between 7 and 17 below if there are no immediate first adjacent channel signals. Because the technical standards only apply to Class I, or television broadcast stations, and the Commission, in Docket 83.117,[17] eliminated the minimum aural power level requirements for television broadcast stations, the deletion of this provision is appropriate in order to align the cable rules with the broadcast rules on this point. All changes mentioned in the review of standards are reflected in the attached Appendix A.

22. We are also eliminating the measurement and recordkeeping requirements. For example, § 76.601 sets forth the responsibility of the cable system

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[17] 49 FR 22089 (May 25, 1984).

operator to perform such tests and measurements as necessary to offer reasonable assurance that the system performance is continuously satisfactory. While the information required by Section 76.601 may be considered minimal at the start-up of a system, the periodic measurement requirements and bookkeeping, however, can become costly and unnecessary. Therefore, we are deleting these signal quality measurements as federal requirements. However, § 76.601 also contains requirements for signal leakage tests which, for reasons stated below, we will retain.

Signal Leakage Limitations

23. In the Notice, the Commission proposed to relax the signal leakage limits to 50 uV/m at 3 meters in the frequency band 54 to 216 MHz. Response to the Notice varied dramatically. Cable operators want

further relaxation to 100 u/Vm at 3 meters based on the findings of the Final Report of the Advisory Committee on Cable Signal Leakage (NTIS Pub. PB80-119605). Comments from over-the-air frequency users refute our Part 15 analogy and request no leakage relaxation, stating that there are numerous instances of interference to terrestrial radio facilities at the present levels. Review of the comments does not produce sufficient supportive and conclusive engineering data from either side. Therefore, we will retain the periodic measurement tests for signal leakage and plan to issue a Further Notice of Proposed Rule Making, requesting additional engineering monitoring and study.

Regulatory Flexibility Final Analysis

24. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The regulations affected by this decision were drafted in 1972, when the cable industry was in its early stage of development. Since then, the industry has matured and competition has grown for cable. In view of that maturity and competition, this action is appropriate to update the Commission's standards policy and reflect the competition.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The Initial Regulatory Flexibility Analysis estimated that adoption of the Notice in its entirety would save over 51,200 work hours. Although one commenter disagreed with that figure, upon careful review of the information before us we still believe that these savings are an accurate estimate.

III. Significant alternatives considered and rejected:

The Commission considered all of the alternatives raised in this proceeding, including the deletion of all standards, the retention of the existing standards, and the retention of standards only in certain defined circumstances, and it considered all the timely filed comments directed to the various issues in the Notice. After carefully weighing all aspects of this proceeding, the Commission has adopted the course of action under the mandate of the Communications Act of 1934, as amended that appears best calculated to eliminate unnecessary regulatory requirements, preserve the appropriate role of federal , state, and local regulatory authorities, and promote rapid and efficient communications to the public.

Paperwork Reduction Act Statement

25. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burden upon the public.

Actions

26. The Secretary shall cause a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq., (1981).

27. Accordingly, it is ordered that under the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, and the Cable Communications Policy Act of 1984, Part 76 of the Commission's Rules is amended as set

forth in Appendix A, effective January 23, 1986.

28. Further information on this proceeding may be obtained from Bernard Gorden or John Wong at 202-632-9660.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix A

PART 76 - [AMENDED]

47 CFR Part 76 is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 154, 303, and 601

2. 47 CFR 76.601 is amended by revising paragraph (b) and removing paragraphs (c), (d), (e), and (f).

§ 76.601 Signal leakage measurements.

* * * *

(b) All cable television systems serving 1,000 or more subscribers, and all cable

television systems serving less than 1,000 subscribers that use any frequency spectrum other than that allocated to over-the-air broadcasting (as described in §§ 73.603 and 73.210), shall conduct all tests, measurements and monitoring of radiation and signal leakage to demonstrate compliance with the radiation limits set forth in § 76.605(a)(11) as follows:

(1) The Cable system operator shall conduct signal leakage measurements in accordance with §76.609(h) at least once each calendar year (at intervals not to exceed 14 months) and shall maintain the resulting test data on file at the operator's local business office for at least five (5) years. It shall be made available for inspection by the Commission on request. This data shall include a description of instruments and procedure and a statement

of the qualification of the person performing the tests.

(2) Successful completion of the performance tests does not relieve the system of the obligation to comply with all other pertinent technical standards set forth in this subpart. Additional or repeat tests may be required by the Commission in order to secure compliance with these standards.

3.47 CFR 76.605 is amended by revising paragraph (a)(3), by removing paragraph (a)(6), by redesignating current paragraphs (a)(7) through (a)(12) as new paragraphs (a)(6) through (a)(11) and by adding a note at the end of the section to read as follows:

§ 76.605 Technical standards

(a) * * *

(3) The aural center frequency of the aural carrier must be 4.5 MHz±kHz above the frequency of the visual carrier

* * * *

Note. —— The requirements of §§ 76.605(a)(1) through 76.605(a)(10) do not apply directly to cable systems. These rule sections or less stringent versions of them may be used as standards by state or local regulatory authorities. No technical parameter in excess of the above rule sections may be required.

Appendix B —— List of Commenters

Initial Comments

1. Adelphia Communications Corporation
2. Addison, Illinois
3. American Radio Relay League, Inc. (ARRL)
4. Association of Maximum Service Telecasters (MST)
5. Atlantic Research Corporation
6. Austin, Texas
7. Cable Television Information Center
8. California Department of Forestry

9. Capital Cities Cable, Inc. (Capital Cities)
10. CBS, Inc.
11. Communications General Corporation
12. Connecticut Department of Public Utility Control
13. County of San Diego (California) Cable Television Review Comm.
14. Forestry, Conservation Communications Association, Inc. (FCCA)
15. General Electric Company (GE)
16. Gill Industries
17. Joseph S. Gans, Inc.; Mid-Coast Cable Television, Inc.; and Service Electric Cable TV, Inc.
18. Hawaii Dept. of Commerce and Consumer Affairs (State of Hawaii)
19. Iowa City, Iowa
20. City of Los Angeles, California
21. Monroe City-County (Michigan) Office of Civil Preparedness

22. Motorola, Inc. (Motorola)

23. Naperville, Illinois

24. National Academy of Sciences (NAS)

25. National Association of Broadcasters (NAB)

26. National Association of State Cable Agencies (NASCA)

27. National Cable Television Association, Inc. (NCTA)

28. National League of Cities

29. National Telephone Cooperative Association

30. New York Citizens' Committee for Responsible Media

31. City of New York

32. New York state Commission on Cable Television

33. Raystay Company

34. Sacramento County, Calif.; California Metro: Montgomery County, Md.;

Cincinnati, Ohio; Scottsdale; Ariz.; and East Saint Louis, Mo.

35. Scientific Atlanta
36. State of California, Telecommunications Division
37. State of New York Department of Environmental Conservation
38. State of New York Department of State
39. Suburban Cablevision
40. Telecable Corporation
41. Tele-Communications Inc.
42. Viacom International Inc..
43. Victor Gates
44. Village of Addison, Illinois
45. Village of Brookfield, Illinois
46. Village of Lisle, Illinois
47. Village of Mayville, and Town of Chautauqua (New York) Cable TV Advisory Committee
48. Village of Woodridge, Illinois
49. Wheaton, Illinois

50. Zenith Electronics Corporation (Zenith)

Reply Comments

1. ARRL
2. Cable Television Information Center
3. Capital Cities
4. Dallas, Texas
5. Department of Defense
6. Joseph S. Gans, Inc.; Mid Coast Cable Television, Inc.; and Service Electric Cable TV, Inc.
7. Gaylord Broadcasting Company
8. J. Steven Grantham
9. Group W Cable, Inc.
10. Harron Communications Corp., Telecable Corporation, and Tribune Cable Communications, Inc.
11. MST
12. NAB
13. NCTA
14. New York Citizens' Committee for Responsible Media

15. City of New York

16. New York State Sheriffs' Association

17. Riverview, Michigan

18. David Alkire Smith

19. Storer Communications, Inc.

20. Viacom International, Inc.

Concurring Statement of Chairman Mark S. Fowler

Re: Signal Quality Rules for Cable Television

The Commission today correctly decided to continue its 1974 preemption of state and local cable signal quality regulations. The possibility of hundreds or even thousands of different standards being adopted by the more than 18,000 cable franchise authorities creates a clear and present danger both to the provision of economically sound interstate cable communications services and to technical progress and innovation from the equipment manufacturing sector. Particularly in times of great technological change and

innovation, technical standards may impede such forces. It is also our responsibility at the federal level to ensure that interstate communications is not substantially burdened by a patchwork of different local regulations. This applies both to cable software and hardware.

As to the local standard setting process, even within federal guidelines, I think the fundamental questions still need to be asked. Where is the compelling government interest? Where is the need for signal quality regulation? Where is the record which shows that the marketplace forces will not accomplish the goal at which signal quality regulation is aimed?

Cable operators, like all providers of video services, depend centrally on signal quality to operate successfully. Cable subscribers have direct access, through their monthly subscription payment, to

marketplace mechanisms which control cable operators decisions on matters such as signal quality. I am unable to understand how anyone could think government standard setters —— with their lack of practical experience in cable construction and maintenance, and inability to react rapidly and flexibly to technological innovations —— can or should be setting quality standards, regulating signal quality, or otherwise second-guessing cable subscribers' decisions as to the signal they receive.

Even if such practical expertise existed, there remains unanswered the justification or governmental intervention. That was my view when we eliminated signal quality standards for broadcast signals; we have not observed any deterioration in that instance. That also was my view when we considered mandating cable carriage of stereo sound. The observations in my separate

statement in that stereo must-carry case are relevant here as well: this too is "a situation where marketplace forces will accomplish the goals that a prior Commission —— with a proregulatory philosophy and less understanding of the value of unregulation in fostering the development of telecommunications —— would have tried to accomplish by inposing rules." That view does not change just because there are intervening parties —— the cities —— who don't agree with the marketplace approach to communications regulation being implemented by this Commission and who wish for some reason to reverse the basic proposition that proof of need should precede government regulation of the people's lives and commerce.

(FR Doc. 85-30196 Filed 12-23-85; 8:45 am)
BILING CODE 6712-01-M

RELEVANT STATUTE CABLE COMMUNICATIONS POLICY ACT OF 1984 (RELEVANT PORTIONS)

PUBLIC LAW 98-549--OCT.30, 1984

[98 STAT.2779]

Public Law 98-549

98th Congress

An Act

[Oct. 30, 1984 [S. 66]]

To amend the Communications Act of 1934 to provide a national policy regarding cable television.

[Cable Communications Policy Act of 1984]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

[47 USC 609 note.]

Section 1. (a) This Act may be cited as the "Cable Communications Policy Act of 1984".

(b) The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Amendment of Communications Act of 1934.

"TITLE VI--CABLE COMMUNICATIONS

"Part I--General Provisions

"Sec. 601. Purposes.

"Sec. 602. Definitions.

"Part II-Use of Cable Channels and Ownership Restrictions

"Sec. 611. Cable channels for public, educational, or governmental use.

"Sec. 612. Cable channels for commercial use.

"Sec. 613. Ownership restrictions.

"Part III--Franchising and Regulation

"Sec. 621. General franchise requirements.

"Sec. 622. Franchise fees.

"Sec. 623. Regulation of rates.

"Sec. 624. Regulation of services, facilities, and equipment.

"Sec. 625. Modification of franchise obligations.

"Sec. 626. Renewal.

"Sec. 627. Conditions of sale.

"Part IV--Miscellaneous Provisions

"Sec. 631. Protection of subscriber privacy.

"Sec. 632. Consumer protection.

"Sec. 633. Unauthorized reception of cable service.

"Sec. 634. Equal employment opportunity.

"Sec. 635. Judicial proceedings.

"Sec. 636. Coordination of Federal, State, and local authority.

"Sec. 637. Existing franchises.

"Sec. 638. Criminal and civil liability.

"Sec. 639. Obscene programming.".

Sec. 3. Jurisdiction.

Sec. 4. Pole attachments.

Sec. 5. Unauthorized reception of certain

communications. Sec. 6. Technical and conforming amendments.
Sec. 7. Support of activities of the United States Telecommunications Training Institute.
Sec. 8. Telecommunications Policy Study Commission.
Sec. 9. Effective date.

AMENDMENT OF COMMUNICATIONS ACT OF 1934

Sec. 2. The Communications Act of 1934 is amended by inserting after title V the following new title:

"TITLE VI--CABLE COMMUNICATIONS

"Part I--General Provisions

"PURPOSES

[47 USC 521.]

"Sec. 601. The purposes of this title are to--

"(1) establish a national policy concerning cable communications;

"(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which

assure that cable systems are responsive to the needs and interests of the local community;

"(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

"(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

"(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

"(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

"DEFINITIONS

[47 USC 522.]

"Sec. 602. For purposes of this title--

"(1) the term 'affiliate, when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

"(2) the term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals;

"(3) the term 'cable channel' or 'channel' means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

"(4) the term 'cable operator' means any person or group of persons (A) who

provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

"(5) the term 'cable service' means--

"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

"(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

"(6) the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service

which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

"(7) the term 'Federal agency' means any agency of the United States, including the Commission;

"(8) the term 'franchise' means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

"(9) the term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise;

"(10) the term 'grade B contour' means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

"(11) the term 'other programming service' means information that a cable operator makes available to all subscribers generally;

"(12) the term 'person' means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

"(13) the term 'public, educational, or governmental access facilities' means--

"(A) channel capacity designated for public, educational, or governmental use; and

"(B) facilities and equipment for the use of such channel capacity;

"(14) the term 'service tier' means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

"(15) the term 'State' means any State, or political subdivision, or agency thereof; and

"(16) the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

"Part II--Use of Cable Channels and Cable Ownership Restrictions

"CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

[47 USC 531.]

"Sec. 611. (a) A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

"(b) A franchising authority may in its request for proposals require as part of

a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 626, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

"(c) A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the

franchising authority pursuant to subsection (b).

"(d) In the case of any franchise under which channel capacity is designated under subsection (b), the franchising authority shall prescribe--

"(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

"(2) rules and procedures under which such permitted use shall cease.

"(e) Subject to section 624(d), a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

"(f) For purposes of this section, the term 'institutional network' means a

communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

"CABLE CHANNELS FOR COMMERCIAL USE

"Sec. 612.

"(b)(2) Any Federal agency, State or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1), except as otherwise provided in this section.

"OWNERSHIP RESTRICTIONS

"Sec. 613.

"(b)(4)(c) The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

"(d) Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any media of mass communications or other media interests.

"Part III--Franchising and Regulation

"REGULATION OF RATES

[47 USC 543.]

"Sec. 623. (a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

"(b)(1) Within 180 days after the date of the enactment of this title, the Commission shall prescribe and make effective

regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection (c).

"(2) For purposes of rate regulation under this subsection, such regulations shall--

"(A) define the circumstances in which a cable system is not subject to effective competition; and

"(B) establish standards for such rate regulation.

"(3) The Commission shall periodically review such regulations, taking into account developments in technology, and may amend

such regulations, consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

"(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise--

"(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

"(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

"(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for

the subscriber's receipt of basic cable service.

"(d) Any request for an increase in any rate regulated pursuant to subsection (b) or (c) for which final action is not taken within 180 days after receipt of such request by the franchising authority shall be deemed to be granted, unless the 180-day period is extended by mutual agreement of the cable operator and the franchising authority.

"(e)(1) In addition to any other rate increase which is subject to the approval of a franchising authority, any rate subject to regulation pursuant to this section may be increased after the effective date of this title at the discretion of the cable operator by an amount not to exceed 5 percent per year if the franchise (as in effect on the effective date of this title) does not specify a fixed rate or rates for basic cable service for a

specified period or periods which would be exceeded if such increase took effect.

"(2) Nothing in this section shall be construed to limit provisions of a franchise which permits a cable operator to increase any rate at the operator's discretion; however, the aggregate increases per year allowed under paragraph (1) shall be reduced by the amount of any increase taken such year under such franchise provisions.

"(f) Nothing in this title shall be construed as prohibiting any Federal agency, State, or a franchising authority, from--

"(1) prohibiting discrimination among customers of basic cable service, or

"(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

"(g) Any State law in existence on the effective date of this title which provides

for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term 'State' has the meaning given it in section 3(v).

[47 USC 153. Report]

"(h) Not later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission

shall conduct regarding the effect of competition in the marketplace.

"REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT

[47 USC 544.]

"Sec. 624. (a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.

"(b) In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system--

"(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 626), may establish requirements for facilities and equipment, but may not establish

requirements for video programming or other information services; and

"(2) subject to section 625, may enforce any requirements contained within the franchise--

"(A) for facilities and equipment; and

"(B) for broad categories of video programming or other services.

"(c) In the case of any franchise in effect on the effective date of this title, the franchising authority may, subject to section 625, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

"(d)(1) Nothing in this title shall be construed as prohibiting a franchising authority and a cable operator from

specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

"(2)(A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

[Effective date.]

"(B) Subparagraph (A) shall take effect 180 days after the effective date of this title.

"(e) The Commission may establish technical standards relating to the facilities and equipment of cable systems which a

franchising authority may require in the franchise.

"(f)(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

"(2) Paragraph (1) shall not apply to--

"(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

"(B) any rule, regulation, or order under title 17, United States Code.

"MODIFICATION OF FRANCHISE OBLIGATIONS

[47 USC 545.]

"Sec. 625. (a)(1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise--

"(A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

"(B) in the case of any such requirement for services, if the cable

operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

"(2) Any final decision by a franchising authority under this subsection shall be made in a public proceeding. Such decision shall be made within 120 days after receipt of such request by the franchising authority, unless such 120 day period is extended by mutual agreement of the cable operator and the franchising authority.

[Courts, U.S.]

"(b)(1) Any cable operator whose request for modification under subsection (a) has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 635.

"(2) In the case of any proposed modification of a requirement for facilities or

equipment, the court shall grant such modification only if the cable operator demonstrates to the court that--

"(A) it is commercially impracticable for the operator to comply with such requirement; and

"(B) the terms of the modification requested are appropriate because of commercial impracticability.

"(3) In the case of any proposed modification of a requirement for services, the court shall grant such modification only if the cable operator demonstrates to the court that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

"(c) Notwithstanding subsections (a) and (b), a cable operator may, upon 30 days' advance notice to the franchising authority, rearrange, replace, or remove a

particular cable service required by the franchise if--

"(1) such service is no longer available to the operator; or

"(2) such service is available to the operator only upon the payment of a royalty required under section 801(b)(2) of title 17, United States Code, which the cable operator can document--

"(A) is substantially in excess of the amount of such payment required on the date of the operator's offer to provide such service, and

"(B) has not been specifically compensated for through a rate increase or other adjustment.

"(d) Notwithstanding subsections (a) and (b), a cable operator may take such actions to rearrange a particular service from one service tier to another, or

otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623.

"(e) A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access.

"(f) For purposes of this section, the term 'commercially impracticable' means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

"RENEWAL

[47 USC 546.]

"Sec. 626. (a) During the 6-month period which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area appropriate notice and participation for the purpose of--

"(1) identifying the future cable-related community needs and interests; and

"(2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

"(b)(1) Upon completion of a proceeding under subsection (a), a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

"(2) Subject to section 624, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

"(3) The franchising authority may establish a date by which such proposal shall be submitted.

"(c)(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the completion of any proceedings under subsection (a), renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public

notice of such proceeding, in accordance with paragraph (2) to consider whether--

"(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

"(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

"(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

"(D) the operator's proposal is reasonable to meet the future cable-related community needs and

interests, taking into account the cost of meeting such needs and interests.

"(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a)), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

"(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such

decision to the cable operator. Such decision shall state the reasons therefor.

"(d) Any denial of a proposal for renewal shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1), pursuant to the record of the proceeding under subsection (c). A franchising authority may not base a denial or renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) or on events considered under subsection (c)(1)(B) in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) occur after the effective date of this title unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchising authority

has waived its right to object, or has effectively acquiesced.

[Courts, U.S.]

"(e)(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 635.

"(2) The court shall grant appropriate relief if the court finds that--

"(A) any action of the franchising authority is not in compliance with the procedural requirements of this section; or

"(B) in the event of a final decision of the franchising authority denying the

renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c).

"(f) Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

"(g) For purposes of this section, the term 'franchise expiration' means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on the date of the enactment of this title.

"(h) Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g).

"COORDINATION OF FEDERAL, STATE, AND LOCAL AUTHORITY

[47 USC 556.]

"Sec. 636. (a) Nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.

"(b) Nothing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title.

"(c) Except as provided in section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

[47 USC 153.]

"(d) For purposes of this section, the term 'State' has the meaning given such term in section 3(v).

JURISDICTION

[47 USC 152.]

Sec. 3. (a)(1) Section (2(a) of the Communications Act of 1934 is amended by adding at the end thereof the following: "The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.".

[Ante, p. 2780. 47 USC 521 note.]

(2) Section 2(b) of such Act is amended by inserting after "section 301" the following: "and title VI".

[47 USC 609.]

(b) The provisions of this Act and amendments made by this Act shall not be

construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications.

OPPOSITION

BRIEF

FILED
OCT 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

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QUESTION PRESENTED

Did the court below correctly conclude that the Cable Communications Policy Act of 1984 confers authority on the Federal Communications Commission to continue its prior policy of preemption with respect to establishment of technical standards for cable television signals?

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

The National Cable Television Association, Inc. ("NCTA"), respectfully submits this brief in opposition to the Petition for Writ of Certiorari filed jointly by the City of New York, the City of Miami, the City of Wheaton, and the National League of Cities ("Cities"). NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 80 percent of the nation's approximately 43 million cable subscribers.[1] NCTA's members also include cable programmers, equipment manufacturers, consultants, and other businesses and individuals affiliated with or inter-

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[1] NCTA has no parent companies, subsidiaries or affiliates.

ested in the cable television industry. NCTA was an intervenor in the proceedings below and is, therefore, a respondent in this proceeding.

STATEMENT OF THE CASE

Starting in 1972 and continuing until 1985, the Federal Communications Commission maintained and enforced a set of mandatory, minimum technical standards for the delivery of "Class I" channels by cable television systems.[2] In addition, following a two-year period between 1972 and 1974 during which the Commission experimented with a dual regulatory approach under which state and local governments were permitted to set their own technical standards, the Commission adhered to a policy of preemption with respect to the establishment of cable television technical standards.[4] This preemption policy, which barred state and local governments from adopting technical standards more stringent than those set by the Commission, was deemed necessary because, when given the opportunity to set their own technical standards, many franchising authorities had responded by imposing "clearly unworkable or impossibly excessive" demands on cable operators.[4] Noting that "electromagnetic

[2] *See Cable Television Report and Order*, 36 F.C.C.2d 143, 200 (1972). Class I channels are channels used for retransmission of broadcast signals. The various technical standards promulgated by the Commission for these channels described, in objective, quantitative terms, the electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers. With respect to Class II, III, and IV channels (which are used for the delivery of nonbroadcast satellite programming, programming originated by the cable operator, and two-way data transmissions), the Commission opted not to impose any technical performance criteria.

[3] *See generally Report and Order in Docket No. 20018*, 49 F.C.C.2d 470 (1974).

[4] *Id.* at 478. Thus, while the Commission's technical standards were intended as "minimum" criteria, in the sense that the were designed to ensure that subscribers received an acceptable level

signals do not change their characteristics according to political boundaries," [5] the Commission concluded that the adoption by state and local governments of additional or more stringent standards interfered with the Commission's paramount statutory mission—the promotion of "a rapid efficient, nation-wide and world-wide wire and radio communications service." [6]

In 1985, following the enactment of the Cable Communications Policy Act of 1984 ("Cable Act"), Pub. L. No. 98-549, *codified at* 47 U.S.C. Sec. 521 *et seq.*, the Commission decided to restructure its regulatory approach with respect to the regulation of cable television technical matters. *Report and Order in MM Docket No. 85-38*, 50 Fed. Reg. 52,462 (1985).[7] Specifically, the Commission announced that it no longer would require as a matter of federal law that Class I cable channels meet particular cable technical standards, leaving it up to state and local governments to decide whether or not to hold cable operators to a minimum level of technical performance. At the same time, however, the Commission decided to retain its technical standards for Class I channels and to continue the existing policy of preempting state and local officials from imposing or enforcing any technical requirements more stringent than those standards.[8]

of service even at the worst locations in the system, they also were meant to serve as "maximum" criteria, in the sense that they established a ceiling for the adoption of technical standards by state and local governments.

[5] *Id.*

[6] *Id.*, quoting 47 U.S.C. Sec. 151.

[7] The Cable Act established, for the first time, a comprehensive statutory framework for the regulation of cable television systems by federal, state, and local governments. Prior to the Act, this Court had affirmed the Commission's broad preemptive jurisdiction with respect to cable television regulation. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[8] With respect to Class II, III, and IV channels, the Commission continued its existing policy of total deregulation and preemption,

In adopting this partial deregulation/preemption approach, the Commission explained that it had concluded that the cessation of federal enforcement of cable television technical performance would not threaten the quality of service received by the public and that, in fact, the public would benefit from the increased flexibility of the cable industry to respond to technical innovation and marketplace developments. *Id.* at 52,464. In defense of its decision to continue its policy of preemption with respect to the establishment of more stringent (or additional) technical standards by state and local governments, the Commission noted that the reasons for preempting more stringent state and local technical standards "appear to be as valid today as they were when the policy was first adopted" in 1974. *Id.* The Commission pointed out that the suppliers of the equipment utilized by cable operators operate in a "national market" and that the adoption of disparate nonfederal technical requirements would "create potentially serious negative consequences for cable system operators and cable consumers in terms of cost of service and the ability of the industry to respond to technological changes." *Id.*

Following the release of the *Report and Order in MM Docket No. 85-38*, the City of New York filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. In its petition, the City of New York argued that, under the Cable Act, the Commission lacked the requisite statutory authority to set a ceiling on state and local technical standards. On March 20, 1987, the Court of Appeals affirmed the Commission's action insofar as it related to Class I cable signals. *City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987).[9]

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thereby prohibiting state and local officials from imposing *any* technical requirements regarding these channels.

[9] The City of New York also challenged the Commission's decision to preclude completely technical regulation of Class II, III, and IV channels. *See* note 8 *supra*. The Court of Appeals remanded to the Commission the portion of the case relating to non-Class I signals. That aspect of the court's decision is not at issue here.

Specifically relying on Section 624(e) of the Cable Act, 47 U.S.C. Sec. 544(e), which states that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems," the court held that the Commission's preemption decision "cannot be said to exceed its statutorily delegated preemption authority." *Id.* at 726. After unsuccessfully seeking rehearing *en banc* by the Court of Appeals, the Cities filed the instant Petition for a Writ of Certiorari on August 25, 1987.

ARGUMENT

The Decision of the Court Below Follows Directly From the Language of the Cable Act and Is Entirely Consistent With the Decisions of this Court

The instant case does not warrant the exercise of this Court's discretionary review power. Contrary to the Cities' Petition, the decision below is not inconsistent with well-settled legal principles. Indeed, it is clear that, in affirming the FCC's narrow preemption of state and local cable television technical standards which exceed federally-promulgated standards, the Court of Appeals properly applied the plain statutory language of the Cable Act and the decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

At the outset, we note that the Cities do not claim that the decision below raises any novel questions of law or creates a conflict within the circuits. Rather, the heart of the Cities' argument is that the Court of Appeals misapplied this Court's decisions regarding federal preemption when it affirmed the Commission's authority to establish a preemptive ceiling on the cable television technical standards that francising authorities may enforce. According to the Cities, preemption of state and local law is authorized only where there is a "clear manifestation" of Congress' preemptive intent and, they argue, there is no such "clear manifestation" in this case.

In fact, however, Congress *has* "clearly manifested" its intent to authorize federal preemption with respect to the promulgation of cable television standards. As the court below recognized, Section 624(e) of the Cable Act expressly confers broad authority on the Federal Communications Commission to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in a franchise." That provision, which contains the only reference to the regulation of cable television technical standards found in the Act, could not be more plain. Moreover, the legislative history accompanying the Cable Act makes absolutely clear that Congress intended that the policies adopted by the Commission pursuant to Section 624(e) were to supersede state and local regulation of the same subject. Specifically, the House Report states that the authority of state and local officials with respect to cable television technical regulation is limited to the establishment of "standards regarding facilities and equipment . . . which are *not inconsistent* with standards established by the FCC under [Section 624(e)]."[10] Thus, even accepting the Cities' argument that preemption is proper only when Congress has clearly expressed an intent to supersede state and local law, there is no need to review the decision below.

In any event, however, the Cities' argument is based on an unduly narrow reading of this Court's precedents concerning federal preemption. Preemption is *not* limited to those situations in which Congress has expressly stated a desire to supplant nonfederal regulation. Indeed,

[10] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 70 (1984) (emphasis added). The general preemptive thrust of the Cable Act is further evidenced by Section 624(a), 47 U.S.C. Sec. 544(a), which precludes state and local governments from regulating the services, facilities and equipment provided by cable operators "except to the extent consistent with [the Cable Act]." *See also* Section 636(c), 47 U.S.C. Sec. 556(c) (any provision of any franchise which is "inconsistent" with the Cable Act is "preempted and superseded").

as this Court's decisions make clear, preemption occurs not only when Congress manifests a clear intent to preempt state and local law, but also

> "when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or *where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Hines v. Davidowitz*, 312 U.S. 52 (1941)." (Emphasis added).[11]

Furthermore, where, as here, a federal administrative regulation is involved, this Court has held that the regulation's preemptive force "does not depend on express congressional authorization to displace state law." *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). Rather, a reviewing court's inquiry is limited to determining whether the regulation

[11] *Louisiana Public Service Comm'n v. FCC*, 106 S.Ct. 1890, 1898 (1986). The instant case is essentially the antithesis of *Louisiana Public Service Comm'n*, wherein this Court held that the FCC could not rely on its general authority with respect to communications policy to preempt state regulation where the Communications Act contained a provision expressly denying the agency any jurisdiction over the particular subject matter at issue. Here, in contrast, the Communications Act (as amended by the Cable Act) not only fails to "fence off" the area in question (establishment of cable television technical standards) from regulation by the Commission, it expressly commits that area to the Commission's jurisdiction. *See also Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

in issue "represents a reasonable accommodation of conflicting policies that were committed to the agency's care" and whether there is any evidence "that the accommodation is not one that Congress would have sanctioned." *Id.*, citing *United States v. Shimer*, 367 U.S. 374, 383 (1961).

As indicated above, it is clear on the face of the Cable Act and its legislative history that Congress has committed the establishment of cable television technical standards to the care of the Federal Communications Commission and that "inconsistent" nonfederal regulation is preempted. Confronted with this unambiguous delegation of preemptive authority to the Commission, the Cities are reduced to arguing that while Congress may have intended that the Commission have the authority to preempt "inconsistent" nonfederal standards, it did not intend to authorize the preemption of additional or more stringent standards. In support of this construction, the Cities point to several unrelated provisions of the Cable Act which expressly permit state and local officials to impose more stringent requirements than those set forth in the Act itself.[12] These provisions, they argue, indicate that Congress also must have intended to permit state and local authorities to supplement the Commission's technical standards with additional or more stringent technical criteria.

The Cities' argument is flawed in several respects. First, the fact that a particular technical standard imposed by a state or local government does not physically preclude compliance with one or more of the FCC's "minimum" standards is irrelevant. As noted above, a preemptive conflict occurs whenever nonfederal law creates "an obstacle to the accomplishment and execution" of a federally-imposed policy. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case, the Commission, acting pursuant to a broad statutory grant of discretionary authority over cable television technical regulation, has determined that the public interest will best be served by a national policy with respect to technical standards which ensures that the cable industry has the flexibility to respond to technological innovation.[13] The unlimited adoption of disparate and conflicting technical standards by innumerable state and local governments will directly conflict with, and thus is inconsistent with, the achievement of this legitimate regulatory objective.[14]

Second, the Cities' reliance on certain provisions of the Cable Act which permit state and local governments to

[12] The provisions of the Cable Act cited by the Cities have nothing to do with the regulation of technical standards. For example, they include Section 634, 47 U.S.C. Sec. 554 (relating to equal employment opportunity); Section 633, 47 U.S.C. Sec. 553 (relating to theft of cable service); and Section 631, 47 U.S.C. Sec. 551 (relating to subscriber privacy). As indicated above, with respect to each of these provisions, Congress *expressly* stated that it intended to permit state and local authorities to adopt more stringent regulations than those set at the federal level. *See House Report* at 78 (subscriber privacy); 84 (theft of service); 93 (EEO).

[13] It is indisputable that a "federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated and in that event would have as much preemptive force as a decision *to* regulate." *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461, U.S. 375, 384 (1983) (emphasis in original). *Accord Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 106 S. Ct. 709, 717 (1986).

[14] *See also Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. at 155-56. The obstacles that nonfederal technical standards can create to the fulfillment of the Commission's goals are readily apparent. For example, as the Commission's two-year experiment with a dual regulatory approach proved, state and local governments are likely to adopt unreasonable and unworkable standards that deter the development of new services. *See Report and Order in MM Docket No. 85-38*, 50 Fed. Reg. at 52,464-5. In addition, given that there are over 18,500 franchising authorities, even "reasonable" standards can create hurdles to the growth of innovative services and equipment if the introduction of such services or equipment required separate approval from each governing authority. *Id.*

exceed federally-imposed standards is misplaced. All that is demonstrated by the provisions cited by the Cities is that when Congress intended for franchising authorities to have the authority to adopt their own, more restrictive regulations in a particular area, it said so in no uncertain terms.[15]

Third, and finally, Congress, in delegating to the Commission the authority to establish preemptive jurisdiction over cable television technical standards, undoubtedly was aware of the Commission's pre-Cable Act preemption policy—a policy under which all technical standards in addition to or in excess of the Commission's standards were deemed to be "inconsistent" with federal law.[16] Given that one of the primary purposes of the Cable Act was to "clarif[y] the current system of local, state, and federal regulation of cable television," *House Report* at 19, the court below was entirely correct in treating this historical "backdrop" as evidence that Section 624(e) of the Cable Act empowers the Commission to continue its existing preemption policy. 814 F.2d at 725-26.[17]

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[15] The Cities note that the legislative history of the Cable Act indicates that certain matters "not addressed in the legislation" are nonetheless subject to state and local authority. *See House Report* at 59. Of course, in the instant case, the extent to which federal, state, and local officials may regulate technical standards *is* specifically addressed in the legislation. *See* text accompanying note 10 *supra*.

[16] *Compare Report and Order in Docket No. 20018*, 49 F.C.C.2d at 481 (declaring policy of preemption with regard to "inconsistent" nonfederal technical regulation) *with Complete Channel TV, Inc.*, 34 R.R.2d (P&F) 1372, 1374 (1975) (stating that, under preemption policy, any "additional" nonfederal technical standards are null and void); *Silver King Video*, 35 R.R.2d (P&F) 1427, 1428 (1975) (Commission's preemption policy extends to local technical standards that "differ from" federal rules); *Sequoia Cablevision*, 36 R.R.2d (P&F) 982, 987 n.6 (1976) (nonfederal technical standards are preempted where they "exceed" federal standards).

[17] *See, e.g., St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978) (where Congress uses language, the meaning of which has been elaborated on in a body of decisions, it may be assumed, in the absence of any indications to the contrary, that the language is intended to be read in light of the meaning previously accorded to it). *See also Peerless Casualty Co. v. United States*, 344 F.2d 495, 496 (D.C. Cir. 1964) (Congress is not assumed to change existing law unless such intent is "clearly and indubitably" manifested). The Cities argue that the court erred in "presuming" that Congress intended to codify the existing preemption policy, suggesting that the Cable Act was intended "to replace" the pre-Act regulatory structure. This contention does not withstand even the most cursory examination. As indicated in the text, Congress' goal was not to discard the existing division of authority among federal, state, and local officials, but rather to "clarify" that division of authority. In addition, the Cities ignore the fact that another key purpose of the Cable Act was to "minimize" unnecessary regulation —further suggesting that the Commission's preemption policy is consistent with congressional intent. *See also* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 21 (citing unrealistic demands for "state-of-the-art" systems as one of the problems leading to the Cable Act).

In sum, this case presents no substantial question worthy of review by this Court. It is irrelevant that state and local governments regard regulation of cable system technical performance as a matter of special concern or that, under the Cable Act, the Commission might have adopted a regulatory policy which did not disturb state law.[18] This case rests entirely on whether the FCC's

[18] *See Free v. Bland*, 369 U.S. at 666; *United States v. Shimer*, 367 U.S. at 381-83. Echoing an argument relied on by the dissent below, the Cities argue that the interpretation accorded the Cable Act by the Court of Appeals completely ousts state and local governments from the field of technical regulation. This simply is not the case. Local officials are *not* limited to applying "already binding" federal requirements. 814 F.2d at 730. Indeed, the federal government no longer requires compliance with any technical standards. Rather, the approach adopted by the Commission (and affirmed by the court below) leaves it entirely up to state and local officials to decide whether they wish to subject cable systems under their jurisdiction to technical regulations. The only limitation is that those state or local governments which opt to enforce technical standards must not exceed the regulatory ceiling enunciated by the Commission.

action was within the scope of its delegated authority. That question, as the court below concluded, is readily answered in the affirmative.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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OPPOSITION

BRIEF

Supreme Court, U.S.
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No. 87-339

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), this Court stated that the Communications Act of 1934 authorized the Federal Communications Commission to preempt local regulation of the standards governing cable television signal carriage (see 467 U.S. at 702-704). The question presented is whether Congress eliminated this aspect of the Commission's preemption authority when it enacted the Cable Communications Policy Act of 1984.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-48) is reported at 814 F.2d 720. The report and order of the Federal Communications Commission (Pet. App. 49-95) is reported at 50 Fed. Reg. 52462.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1987, and a petition for rehearing was denied on May 27, 1987 (Pet. App. 1). The petition for a writ of certiorari was filed on August 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Cable television systems transmit "a variety of broadcast and nonbroadcast signals obtained from several sources" to subscribers who pay service fees (*Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700-701 (1984)). The Federal Communications Commission (FCC) began regulating the operations of cable television systems in the

1960's. The Commission's early regulations were principally directed toward establishing rules for cable systems' carriage of local and distant television broadcast signals. *Id.* at 701-702; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

The Commission revised its cable television regulatory regime in 1972. Rather than importing into the cable television context the federal licensing system used to regulate the operations of television broadcasters, the Commission adopted a program of " 'deliberately structured dualism' " (*Capital Cities Cable, Inc.*, 467 U.S. at 702 (citation omitted)). It allocated to state and local authorities "responsibility for granting franchises to cable operators within their communities and for overseeing such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way" (*ibid.*).[1] The Commission retained for itself "exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Ibid.*; *Cable Television Report and Order*, 36 F.C.C.2d 143, 170-176, 207-210, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); see also *Cable Television*, 46 F.C.C.2d 175, 178 (1974).[2]

---

[1] The Commission set minimum standards for the franchisee selection process, construction deadlines, duration of franchises, subscriber rates, and the handling of subscriber complaints. *Cable Television Report and Order*, 36 F.C.C.2d 143, 207-209, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). These minimum standards were subsequently eliminated. *Applications for Certificates of Compliance*, 66 F.C.C.2d 380, 391 (1977), on reconsideration, 71 F.C.C.2d 569 (1979), aff'd *sub nom. Brown* v. *FCC*, 615 F.2d 1368 (D.C. Cir. 1980) (Table).

[2] The Commission characterized this dual regulatory scheme as an accommodation of its responsibility "to assure the orderly development of this new technology into the national communications structure" with the local interest in regulating the use of community streets and rights of way. See *Duplicative and Excessive Over-Regulation of Cable Television*, 54 F.C.C.2d 855, 861, 863 (1975).

In exercising its authority to regulate the technical and operational aspects of cable television systems, the Commission divided cable services into four categories: Class I cable channels, which consist of those channels used to deliver the signals of television broadcast stations; Class II channels, those "used for delivering non-encoded 'cablecast' programming such as Cable News Network, ESPN, and public, educational, and governmental access programming"; Class III channels, those that deliver "encoded cablecast programming such as Home Box Office and other pay channels"; and Class IV channels, those "with two-way transmission capability allowing subscribers to return information to the control point." Pet. App. 8-9; *Cable Television Report and Order*, 36 F.C.C.2d at 198-199. The Commission prescribed minimum technical standards to govern the signal quality of Class I channels; it did not establish technical standards for the other channel classes. At the time the Commission issued its standards, no State or franchising authority had adopted technical standards of this sort. The Commission found no reason at that time to assert its authority to preempt local regulation in this area; it decided to allow franchising authorities the option of subjecting cable systems to more stringent technical standards. *Cable Television Report and Order*, 36 F.C.C.2d at 198-201; *id.* at 359-360 (on reconsideration).

Over the next few years, as local franchising authorities began to adopt technical standards, the Commission became concerned that local regulation would undercut federal cable television policy. Accordingly, just two years after the issuance of its technical standards, the Commis-

sion instituted a rulemaking proceeding to determine whether to preempt local regulation of technical standards. See *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking*, 46 F.C.C.2d 175 (1974).

After considering the comments filed in response to the notice of proposed rulemaking, the Commission concluded that preemption was warranted. It found that state and local technical standards "cover the entire range of possibilities from highly sophisticated standards developed after full studies of the technical and socio-economic effect of the proposed regulations to clearly unworkable or impossibly excessive demands" (*Cable Television*, 49 F.C.C.2d 470, 471, 478 (1974)). The Commission stated that these diverse local standards were an obstacle to the achievement of an efficient and innovative communications service. For example, the Commission concluded that nonuniform technical standards could impede the development and marketing of cable system equipment, declaring that "[t]he spectre of having to manufacture specialized equipment based on jurisdictionally imposed technical standards cannot be ignored" (*id.* at 479).

In order to "rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions," the Commission barred local jurisdictions from imposing technical standards more stringent than those adopted by the Commission (*Cable Television*, 49 F.C.C.2d at 480). The Commission made clear that it was only preempting local authority to prescribe technical performance standards—"quantitative definitions of the electrical or optical characteristics of a signal source, transmission system, or terminating device" (*id.* at 471). Local franchising authorities retained the ability to specify a cable system's design features, facilities, and equipment (*id.* at 471-472).

This Court affirmed the Commission's preemption authority in sweeping terms in *Capital Cities Cable, Inc.* v. *Crisp*, *supra*. The Court stated that the Commission's "comprehensive" authority to regulate all aspects of interstate communication by wire or radio includes the power to regulate cable television systems, and that this authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities' " (467 U.S. at 700 (citation omitted)). Thus, "if the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, [the Court] must conclude that all conflicting state regulations have been precluded" (*ibid.* (citation and footnote omitted)). Finding that the Commission had retained "exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards," the Court concluded that a state law regulating commercial advertising was invalid because the statute "interfered with a regulatory area that the Commission has explicitly pre-empted." *Id.* at 702, 705 (footnote omitted); see also *New York State Comm'n* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

2. Against this regulatory background, Congress in 1984 adopted the Cable Communications Policy Act, 47 U.S.C. (Supp. III) 521 *et seq.* (Cable Act), an amendment to the Communications Act of 1934 designed to "clarif[y] the current system of local, state and Federal regulation of cable television" (H.R. Rep. 98-934, 98th Cong., 2d Sess. 19 (1984)). Congress sought to "preserve the critical role of municipal governments in the franchise process," while at the same time "defining and limiting the authority that a franchising authority may exercise through the franchise process" (*ibid.*). The statute also affirmed the FCC's "exclusive jurisdiction over cable service, over all persons engaged in the provision of cable service, and over the facilities which relate to such service, as provided in" the Cable Act (*id.* at 95).

The statute expressly reserves to local franchising authorities the right to select cable franchisees (47 U.S.C. (Supp. III) 541) and specify the services and types of facilities and equipment that a franchisee must provide (47 U.S.C. (Supp. III) 541(a), 544(b)). At the same time, the statute imposes specific limitations upon the powers of local franchising authorities. See, *e.g.*, 47 U.S.C. (Supp. III) 542 (prohibiting assessment of a franchise fee greater than five percent annually); 47 U.S.C. (Supp. III) 543 (barring regulation of cable rates except where there is no effective competition); 47 U.S.C. (Supp. III) 546 (specifying conditions under which a franchise must be renewed).

The provision of the Cable Act directly pertinent to this case is Section 624, 47 U.S.C. (Supp. III) 544, which is entitled "Regulation of services, facilities, and equipment." Section 624(a) states that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter" (47 U.S.C. (Supp. III) 544(a)). The next subsection authorizes franchising authorities to "establish requirements for facilities and equipment" (47 U.S.C. (Supp. III) 544(b)(1)). That provision's legislative history states that these facility and equipment requirements may include (H.R. Rep. 98-934, *supra,* at 68) specifications of "channel capacity; system configuration and capacity, including institutional and subscriber networks; headends and hubs; two-way capability; addressability; trunk and feeder cable; and any other facility or equipment requirement, which is related to the establishment and operation of a cable system, including microwave facilities, antennae, satellite earth stations, uplinks, studios and production facilities, vans and cameras for [public, educational, and governmental access] use."

Section 624(e) states that the FCC "may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require

in the franchise" (47 U.S.C. (Supp. III) 544(e)). This provision allows the Commission "to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchise agreement" (H.R. Rep. 98-934, *supra,* at 70). It "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franch[i]se pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection" (*ibid.*).

3. In April 1985, the Commission issued a notice of proposed rulemaking regarding its cable television technical standards. See 50 Fed. Reg. 7801-7804 (1985). The Commission observed that the technical standards "were adopted at a time when the cable industry was little more than a series of master antenna systems for communities. The only competition to the service was over-the-air broadcasting" (*id.* at 7801). "Since 1972," the Commission stated, "competition has increased from several sources, including video cassette recorders, satellite home earth terminals, and multipoint distribution systems. It therefore seems appropriate to reevaluate the technical requirements at this time" (*ibid.*).

The Commission proposed to delete the technical standards from its rules and regulations and publish them instead as guidelines that local authorities could include in franchise agreements pursuant to 47 U.S.C. (Supp. III) 544 (see 50 Fed. Reg. 7802 (1985)). The Commission observed that it had preempted local jurisdiction in the area of technical requirements in order to "prevent any adverse impact on the growth of cable television because of the imposition of overly burdensome technical requirements at the local level" (*ibid.*). Because the Commission "continue[d] to believe that this concern is valid and that there should be a national policy in the technical

area," it proposed to continue that preemption policy (*ibid.*).[3]

After considering the comments filed in response to the notice of proposed rulemaking, the Commission adopted a modified version of the proposed rule (Pet. App. 49-95). The Commission concluded that "the primary determinants of the quality of [cable] service that will be provided are the technical state of the art, the underlying economics of the industry, and the market incentives and competitiveness of the markets involved" (*id.* at 64). It was "persuaded that in the vast majority of situations the severe penalties that will be imposed in the marketplace for those operations that do not perform satisfactorily far exceed and can safely be used to replace FCC penalties that might be imposed through the regulatory process" (*id.* at 65-66). In light of that circumstance, and of the continuing authority of state and local franchising authorities to enforce federally prescribed technical standards, the Commission concluded that "federally enforced standards are no longer necessary or desirable" (*id.* at 66).

The Commission found it appropriate "to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations" (Pet. App. 66-67). The Commission observed that "[t]echnical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes" (*id.* at 66). The Commission stated that its long-

[3] The notice of proposed rulemaking also requested comments regarding a proposal to alter the rules governing signal leakage from cable systems (see 50 Fed. Reg. 7802-7803 (1985)). The Commission took no action on this proposal, deciding that the matter required further study (Pet. App. 79-80).

standing policy of preempting local regulation of technical standards was designed to avoid these adverse effects, and found that "[t]he reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted" (*id.* at 68).

The Commission explained that "[t]he video products that cable systems sell and the processing and transmission equipment used in the construction of cable systems are overwhelmingly associated with national markets that can be severely burdened by disparate and conflicting local regulations and standards" (Pet. App. 69). The cost to equipment suppliers of "keeping track of and complying with numerous different requirements is undeniably significant and there appear to be few if any countervailing benefits associated with such disparate requirements" (*ibid.*).[4]

The Commission further found that disparate local technical standards might well deter technological innovation. The Commission stated that "[t]he obstacles that would be created to such innovation were it necessary to win the approval of numerous franchise authorities before use was possible would be most formidable, even if local authorities were equipped to respond to the sophisticated technical issues involved" (Pet. App. 71). The Commission illustrated the potential problems by discussing the development of "baseband" cable converters (*id.* at 70-71).

The Commission further concluded that its preemption authority had not been altered by the Cable Communications Policy Act. The Commission observed that its policy is "wholly consistent with the Cable Act's intent to establish a national policy that encourages the growth and development of cable television services" (Pet. App. 73 (footnote omitted)). Citing Section 624(e), which expressly empowers the Commission to issue technical standards,

[4] The Commission noted that cable systems operate in more than 18,500 communities (Pet. App. 69).

the Commission stated that the Act "appears to specifically anticipate the continuation of our existing policy" (Pet. App. 72). And the Commission found "nothing in the legislative history that suggests Congress did not approve of the existing policy or that it intended to limit our ability to continue it" (*id.* at 72-73 (footnote omitted)).[5]

4. The court of appeals upheld the Commission's order in part and vacated the order in part by a divided vote (Pet. App. 4-48). The court first considered the Commission's authority to preempt state and local regulation of technical standards. It observed that " '[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law' " (*id.* at 17, quoting *Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 13). "Since Congress legislated against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation," the court said, "we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions" (Pet. App. 19-20).

The court of appeals looked to 47 U.S.C. (Supp. III) 544 to determine whether Congress intended to modify prior law. It observed that Congress authorized local franchising authorities to "establish requirements for facilities and equipment" to be provided by the cable operator (47 U.S.C. (Supp. III) 544(b)(1)), but at the same time "clearly limit[ed] a franchisor's freedom of action" (Pet. App. 21) by stating that "any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the statute (47 U.S.C. (Supp. III) 544(a)). The court stated that Section 624(e), 47 U.S.C. (Supp. III) 544(e), which authorizes the FCC to establish technical standards relating to

[5] The Commission noted that a number of commenters had suggested changes in the technical standards. It concluded that several adjustments were appropriate (Pet. App. 76-79).

facilities and equipment, "indicates [that] the authority to curtail [the franchisors'] freedom of action was delegated to the FCC, at least insofar as the FCC's 'technical standards' overlap the franchisors' specifications of certain 'services, facilities and equipment' " (Pet. App. 21).

The court observed that the provision's legislative history supported its interpretation of the statutory language. The court quoted the passage of the House report stating that the delegation of authority to the Commission " 'does not affect the authority of a franchising authority to establish standards regarding facilities and equipment . . . which are *not inconsistent with standards established by the FCC* under this subsection' " (Pet. App. 21-22 (citation omitted; emphasis added by the court of appeals)). It concluded that the phrase "not inconsistent with" authorized the preemption of any technical standard that exceeds a standard established by the FCC. The court rejected petitioners' argument that the statute permits franchising authorities to subject a franchisee to technical standards more onerous than the FCC's standards (*id.* at 25-26). Because the Commission's preemption decision as to Class I channels thus fell within its statutory authority, the court upheld the Commission's determination.[6]

The court reached a different conclusion with respect to the Commission's decision to bar franchising authorities from setting technical standards for Class II, III, and IV channels, while forbearing from setting technical standards itself. The court noted that the provision of the Cable Act governing the renewal of cable television franchises authorizes a franchising authority to consider signal quality in deciding whether to renew the franchise (see 47

[6] The court observed that it is not clear whether deference to an agency's interpretation of its governing statute is appropriate in assessing the scope of the agency's preemption authority. The court found no need to resolve that question, however, because its construction of the statute was not based upon deference to the Commission's interpretation of Section 624. Pet. App. 23-25.

U.S.C. (Supp. III) 546(c)(1)(B)). It stated that the Commission's refusal to adopt technical standards for Classes II, III, and IV, combined with its policy of forbidding franchising authorities from adopting such standards, "seems to put franchisors in a 'Catch-22' position": a franchising authority can only evaluate a cable operator's signal quality by reference to objective technical standards, but no such standards have been adopted by the FCC and standards may not be adopted by the franchising authority itself (Pet. App. 32). The court concluded that the Commission "had an obligation explicitly to consider the interrelationship between [the statutory provision governing technical standards (Section 624) and the provision governing franchise renewals (Section 626)]. That it chose not to makes its rulemaking here defective" (*id.* at 34-35). The court directed the Commission to address the issue on remand.

Judge Mikva dissented from the portion of the court's opinion upholding the Commission's authority to preempt local regulation of technical standards for Class I cable channels (Pet. App. 35-48). He concluded that the statute allows local franchising authorities to impose technical standards more stringent than the standards adopted by the Commission.

ARGUMENT

The petition for a writ of certiorari should be denied for two independent reasons. First, wholly apart from the merits, petitioners' attempt to obtain review in this Court is premature. The practical importance of the issue raised in the petition is dependent to a significant extent upon the outcome of the portion of the case that the court of appeals remanded to the Commission. This Court should therefore stay its hand pending further honing of the issues in this case in the remand proceedings.

Second, the decision of the court below involves nothing more than the application of settled legal principles to a particular set of statutory provisions. Petitioners do not quarrel with the legal principles applied by the court of appeals, which were clarified in a unanimous opinion of this Court dealing with the Commission's regulation of the very subject matter at issue here. The only dispute is whether the court was correct in its interpretation of the relevant provisions of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984. That narrow question—relevant only to the particular exercise of preemption authority at issue here—does not present an issue warranting this Court's attention at this time.

1. In adopting technical standards for cable television systems, the Commission differentiated between Class I cable channels—those channels that carry television broadcast signals—and all other cable channels. The Commission prescribed substantive standards that apply only to Class I channels and precluded any local regulation more onerous than those federal standards. With respect to the other classes of channels, the Commission precluded local regulation without adopting substantive federal standards. See page 3, *supra*.

The court of appeals also distinguished between Class I channels and other cable channels. The court upheld the Commission's preemption authority with respect to local standards applicable to Class I channels. It remanded the portion of the Commission's order that barred local regulation of technical standards for Class II, III and IV channels, directing the Commission to reconsider its determination in light of certain provisions of the Cable Communications Policy Act. See pages 10-12, *supra*.

Although the Commission and the court of appeals have thus far distinguished in the foregoing ways between technical standards applicable to Class I channels and

those governing transmissions over other classes of cable channels, there is, in fact, a significant link between the quality of transmissions for the different classes of channels. A technical standard applicable to one class of cable channels will force the cable operator to select equipment that produces a transmission that satisfies that standard. And, because all cable transmissions are carried over essentially the same equipment, transmissions on the other classes of channels will be affected and are likely to achieve the same level of quality. As a practical matter, therefore, a technical standard applicable to one class of channels is likely to control the quality of transmissions on all other channels.[7]

The purpose of the remand proceeding ordered by the court of appeals is to permit the Commission to reexamine its decision to preempt local regulation of technical standards for transmissions on Class II, III, and IV channels without prescribing substantive federal standards to govern those transmissions. The outcome of the FCC proceeding and any judicial review, is, of course, uncertain at this time. If the matter were resolved by permitting franchising authorities to prescribe technical standards for Class II, III, and IV channels, or by adopting different federal standards for these classes of channels, those standards would effectively apply to Class I channels as well. Thus, the outcome of the remand proceedings may affect the practical importance of the question presented in the petition for a writ of certiorari, and would enable the case to be presented to this Court in a more comprehensive manner. The Court should therefore decline to

[7] The Commission attempted to defend its decision on this ground in the court of appeals, but the court concluded that it could not consider the argument because the rationale was not reflected in the Commission's decision (Pet. App. 27-28 n.8). That ruling, of course, does not preclude the Commission from considering this technical interrelationship on remand.

review the court of appeals' decision at this time. Petitioners will be free to raise the issue presented in the petition, together with any claims arising out of the remand proceedings, after the completion of those proceedings.

2. Moreover, the court of appeals properly applied settled legal principles in upholding the Commission's preemption authority. This Court recently observed that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law" (*Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 13). The sole question here, therefore, is one of federal statutory interpretation.

Prior to the adoption of the Cable Communications Policy Act of 1984, Congress's intent to endow the Commission with preemption authority was clear. See *Capital Cities Cable, Inc.*, 467 U.S. at 702-704. That authority rested upon Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), which grants the FCC broad regulatory power over interstate communications by wire and radio (see 467 U.S. at 699-700, 702-704).

Congress indicated in the Cable Act that it did not intend to eliminate the Commission's pre-existing authority to regulate cable television. Congress added a sentence to Section 2(a) stating that the provisions of the 1934 Act "shall apply with respect to cable service, * * * as provided in" the statutory provisions added by the Cable Act (47 U.S.C. (Supp. III) 152(a)). Congress explained that this language was designed to "grant[] the FCC exclusive jurisdiction over cable service, * * * as provided in" the Cable Act (H.R. Rep. 98-934, 98th Cong., 2d Sess. 95 (1984)). Thus, Congress reaffirmed the FCC's broad authority over cable systems, subject to the limitations prescribed by the Cable Act. As the court of appeals observed, Congress was well aware of the Commission's preemption authority when it adopted the 1984 statute.

"Since Congress legislated against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation, we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions" (Pet. App. 19-20).

Moreover, the manner in which Congress crafted the substantive provisions of the Cable Communications Policy Act strongly confirms that Congress intended the Commission to retain broad authority to regulate cable systems. A variety of statutory provisions expressly bar the Commission from adopting certain types of regulations, even though the Cable Act itself does not expressly grant the Commission the specific affirmative authority to take those actions. See 47 U.S.C. (Supp. III) 542(i), 543(a), 544(f)(1). The logical explanation for these prohibitions is that Congress intended that, absent a specific statutory limitation upon the Commission's authority in the Cable Act, the Commission would retain the same broad authority that it possessed prior to the adoption of that Act. Congress added these express limitations upon the Commission's powers in the circumstances in which it wanted to prevent the Commission from exercising that broad authority in a particular manner.

The appropriate inquiry in this particular statutory setting, accordingly, is whether the statute indicates that Congress intended to eliminate the Commission's previously established authority to preempt local regulation of technical standards. There simply is no evidence that Congress intended to reduce the Commission's authority in this manner. Indeed, the statute adopts the division of authority devised by the Commission in its own regulations (see page 4, *supra*). Franchising authorities may "establish requirements for facilities and equipment" (47 U.S.C. (Supp. III) 544(b)(1)), prescribing the specifics of the configuration of the cable system such as the number of channels to be provided by the cable operator

(see page 6, *supra*). The Commission may set "technical standards" (47 U.S.C. (Supp. III) 544(e)), prescribing the level of transmission quality and other performance standards that cable systems may then be required to satisfy. The legislative history states that the franchising authority's facility and equipment requirements must be "not inconsistent" with the Commission's technical standards (H.R. Rep. 98-934, *supra*, at 70). Viewed against the background of the prior regulatory scheme, this language is properly interpreted as a reaffirmation of the Commission's authority to give preemptive effect to the technical standards it issues. Because Congress adopted the Commission's approach with respect to regulation of technical standards in other respects, it undoubtedly would have called attention to any change from prior law. The absence of any express reference to a change in the status quo thus weighs strongly in favor of upholding the Commission's preemption authority.[8]

In addition to the unusually illuminating background against which Congress was legislating, several additional

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[8] Petitioners suggest (Pet. 29) that the court of appeals upheld the Commission's preemption authority even though it found only an ambiguous congressional delegation of preemption authority. In fact, the court of appeals concluded that Congress had not disturbed its prior broad delegation of preemption authority to the Commission and, turning to the specific preemption question in this case, it found no basis for ascribing to Congress the intent to bar the Commission from preempting local technical standards. The court instead found that Section 624 and its legislative history indicated that Congress intended to reaffirm that authority. See Pet. App. 19-22, 25-26. Similarly, petitioners err in suggesting (Pet. 36-38) that the court of appeals "presume[d]" that Congress reaffirmed the Commission's prior preemption authority. After considering the text of the statute and its legislative history, the court correctly concluded that Congress did not intend to eliminate the Commission's pre-existing authority to regulate cable systems. Pet. App. 19-22.

Petitioners rely (Pet. 30) on *New York State Dep't of Social Services* v. *Dublino*, 413 U.S. 405 (1973), but *Dublino* actually confirms the

factors confirm that Section 624 should be read to authorize the Commission to preempt local regulation of technical standards. The provision makes clear that the regulatory powers of local franchising authorities are limited by the federal statute (see 47 U.S.C. (Supp. III) 544(a)). The statute then distinguishes between equipment and facility specifications, which are the province of the franchising authority, and technical performance standards, which are the province of the Commission. This express division of authority makes clear that the basic responsibility for setting technical standards rests with the Commission. See H.R. Rep. 98-934, *supra*, at 70 (Commission empowered to "set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchise agreement").

The statute's legislative history addresses the situation in which a franchising authority's equipment and facility specifications overlap with the Commission's technical

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propriety of the decision below. This Court in *Dublino* declined to find that the social security statute preempted state laws requiring individuals to accept employment as a condition of federal aid because (1) preemption would impair the ability of the state to deal effectively with critical welfare problems (413 U.S. at 413); (2) 21 States had already adopted welfare rules when the federal statute was enacted, and if Congress had wanted to preempt those programs it would have said so unambiguously (*id.* at 414); (3) the agency responsible for administering the federal regulations had never considered the federal program to be preemptive (*id.* at 420); and (4) the state program was complementary and harmonious with the federal program (*id.* at 421). In this case, by contrast, (1) federal technical standards guarantee acceptable quality thus rendering more demanding local regulation unnecessary (Pet. App. 54-55 n.2); (2) local technical regulation was preempted at the time the Cable Act was passed, and upholding the Commission's preemption authority thus will not nullify established local regulatory programs; (3) the FCC has long held its technical standards to be preemptive; and (4) local technical regulation would conflict significantly with federal goals of cable television regulation (*id.* at 66-72).

standards. It states that the authority's specifications may not be "inconsistent" with the Commission's standards. We submit, as the court of appeals held, that the fair reading of this legislative history, in the entire statutory context, is that the franchising authority cannot subject a cable operator to an obligation different from that prescribed by the FCC if the Commission concludes, as it has here, that preemption of such additional technical requirements is necessary to achievement of the federal statutory purposes.[9]

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[9] Petitioners cite (Pet. 32-34) several instances in which Congress authorized franchising authorities to impose regulations "consistent" with a standard spelled out in the Cable Communications Policy Act and note that the legislative history in each instance expressly states that more stringent local regulation is a permissible option. But the legislative history of Section 624 contains no similarly narrow express definition of "inconsistent."

Petitioners also complain (Pet. 31-35) that the court of appeals made no attempt to avoid preemption by reconciling the state and federal regulatory programs. Such a reconciliation was clearly impossible here because the very essence of the federal policy is to avoid the multiplicity of technical standards that would result from permitting franchising authorities to prescribe technical standards. Preemption of local standards more stringent than the federal standards is the only means by which the federal objective may be achieved. See Pet. App. 66-75; pages 8-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOINT

APPENDIX

Supreme Court, U.S.
FILED
JAN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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January 25, 1988

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RELEVANT DOCKET ENTRIES

Relevant Docket Entries Before FCC

1. February 12, 1985 - Notice of Proposed Rulemaking Issued in MM Docket No. 85-38

2. October 31, 1985 - Report and Order Issued in MM Docket No. 85-38

Relevant Docket Entries In United States Court of Appeals for the District of Columbia Circuit

1. December 26, 1985 - Petition for Review Filed by City of New York

2. March 20, 1987 - Opinion of the Court of Appeals

3. May 27, 1987 - Order of the Court of Appeals Denying Petition for Rehearing

4. May 27, 1987 - Order of the Court of Appeals Denying Suggestion for Rehearing En Banc

[50 Fed. Reg. 7801 (Feb. 26, 1985)]

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 85-38; FCC 85-66]

Review of Technical and Operational Requirements, Cable Television

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The FCC proposes to delete quality performance standards for cable television systems. This action has become possible due to the increase in competition to cable from alternative video sources, such as, video cassette recorders. The Commission proposes to retain the regulations relating to leakage levels from cable systems due to the potential of cable systems to interfere with over-the-air radio services. A relaxation in the leakage limits is, however, proposed. Adoption of the

proposals would result in a savings of approximately 51,200 burden hours each year by the industry.

DATES: Comments must be submitted by March 29, 1985, and reply comments submitted by April 15, 1985.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Bernard Gorden, Mass Media Bureau, Phone (202) 632-9660.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 76

Cable television.

Proposed Rule Making

In the matter of review technical and operational requirements of Part 76, Cable Television (MM Docket No. 85-38)

Adopted: February 12, 1985
Released: February 20, 1985

By the Commission.

Introduction

1. Part 76 of the FCC Rules and Regulations currently contains several sections that define technical parameters that must be met by cable television

(CATV) systems. The rules can be divided easily into two distinct categories: (1) Quality performance standards, and (2) interference control standards. At the time these rules were adopted, they were intended to define a basic quality of service to be expected by subscribers and to limit the interference potential to over-the-air radio services caused by leakage from CATV systems. In the past decade, since adoption of the technical parameters, the cable industry has matured and competition from other video services has significantly increased. It is therefore appropriate to re-examine and update the rules at this time.

Background

2. The present technical rules were adopted in 1972 as part of a general FCC proceeding entitled, "Cable Television Report and Order" (36 FCC2d 141). The primary document relating to technical

standards was Docket 18894, although a total of six dockets were resolved in the general proceeding. The docket established basic performance criteria and required annual performance tests to be accomplished to demonstrate compliance with the technical rules. Because some of the new parameters required specialized and costly equipment, the economic impact of the regulations on smaller cable systems was examined in the Report and Order in Docket 1965 (47 FCC2d 769). Ultimately a "phased-in" approach was chosen to implement the new rules over a three year period, thus lessening the impact on any system.

3. Section 76.605 of the FCC Rules and Regulations contains the specific performance parameters for cable systems. The rule section includes 12 subsections, the first 11 of which describe performance at subscriber terminals and one of which

relates to cable signal leakage. The performance criteria include specifications for: (1) The frequency boundaries of cable television channels, (2) the frequency tolerance of CATV visual carriers, (3) the frequency tolerance of CATV aural carriers, (4) the minimum visual carrier levels at subscriber terminals, (5) the allowable tolerance for visual carrier level variation within 24 hours, (6) the maximum and minimum aural carrier specifications with respect to visual carrier levels, (7) the maximum allowable level of visual low frequency distortion, (8) the frequency response of each channel, (9) the allowable visual signal to system noise level and to any undesired co-channel signal, (10) the allowable level of intermodulation distortion, (11) the minimum amount of isolation between subscriber terminals, and (12) the signal leakage limitations.

4. Sections 76.605(a)(9) and 76.605(a)(10), which pertain respectively to the ratio of visual signal to any undesired co-channel television signal and intermodulation distortion, have never been implemented due to the complexity of the measurements. All of the other 10 provisions are now in place and systems must show compliance on a yearly basis in accordance with § 76.601. Most of the guidelines for measurement techniques to show compliance with § 76.605 are contained in § 76.609.

5. All of the technical standards that are now in the Rules were adopted at a time when the cable industry was little more than a series of master antenna systems for communities. The only competition to the service was over-the-air broadcasting. The present rules were therefore adopted to assist in the development of a nationwide series of

CATV systems that would provide reasonable levels of service to subscribers. Federal standards also provided a guide for local governments to adopt in technical portions of franchise agreements. Since 1972, competition has increased from several sources, including video cassette recorders, satellite home earth terminals, and multipoint distribution systems. It therefore seems appropriate to reevaluate the technical requirements at this time.

Issues

6. There are 2 basic issues that must be resolved, as follows:

(1) Are the home subscriber quality standards still important, or has competition from other sources eliminated the need for regulations?

(2) Are the signal leakage limits still required; and, if so, are the limits contained in the Rules still appropriate?

Each issue will be considered separately.

Issue 1: Subscriber Quality Standard

7. As mentioned earlier, CATV systems have considerably more competition today than a decade ago. As CATV systems have expanded into metropolitan areas, the service quality has had to be maintained at least at levels equivalent to what was available free from over-the-air reception. Also, sources of cable-only programming have expanded dramatically in the past few years. Most of these cable-only services are delivered by high-quality satellite links. CATV operators, therefore, have strong marketing incentives to maintain systems that are capable of transporting products at quality levels far exceeding those specified in § 76.605 of the Rules.

8. The industry has already developed its own sets of quality specifications.

Many individual CATV operators have developed "in-house" technical requirements that exceed the FCC Rules. These industry standards were developed with the goal of subscriber satisfaction, not with the goal of meeting minimum Federal regulations. In addition to individual operator performance parameters, the National Cable Television Association (NCTA), a trade organization of cable operators, has published a booklet entitled **NCTA Recommended Practices for Measurements on Cable Television Systems.** The booklet provides a guide to distribution system performance as well as head end performance. Although the FCC requirements have formed the basis of many of the NCTA performance guidelines, the guidelines in general exceed those of the FCC. Numerous other printed measurement procedures are also

available from many of the cable equipment manufacturers.

9. Considering the strong incentives for CATV systems to deliver quality signals and the performance guidelines available from industry sources, there no longer appears to be a need for the quality performance standards to remain in the FCC Rules and Regulations. This proposition is amplified by the fact that the failure of a CATV system to provide quality service does not adversely impact other radio services. We therefore propose to delete all of the service quality standards contained in § 76.605, i.e. §§ 76.605(a)(1) through 76.605(a)(11). This action would moot § 76.605(b) which exempts certain CATV systems from the quality rules. Additionally, the yearly performance requirements of § 76.601 would be deleted. Finally, except for the signal leakage

specifications, the measurement procedures described in § 76.609 would be deleted. Although the specific performance parameters described above would be removed from the Rules, we are not proposing to remove the requirement that "must-carry" television broadcast signals be provided with no material degradation. We continue to believe that cable systems should provide subscribers with "must-carry" signals equivalent in quality to what is available over-the-air.

10. Deleting the above referenced rule sections does raise an issue. Since 1974, the Commission has preempted local jurisdiction in the area of technical requirements.[1] This has been done to prevent any adverse impact on the growth of cable television because of the imposition of overly burdensome technical

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[1] Report and Order, Docket No. 20018, 49 FCC2d 470 (1964).

requirements at the local level. The Commission continues to believe that this concern is valid and that there should be a national policy in the technical area. The Cable Act clearly allows the Commission to establish such technical requirements (see section 624(e) of the Cable Act). However, if the technical requirements are removed from the Rules, local jurisdictions will have no technical parameters that can be included in franchise agreements.[2] We propose, therefore, to publish the deleted rule sections in an OST (FCC Office of Science and Technology) bulletin. In accordance with the Act, we would permit local franchising authorities to include any of the guidelines in the OST bulletin in franchise agreements. Any technical

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[2] See H.R. Report 96-934, 98th Cong., 2d Sess. at 70, which provides that franchising authorities may not establish standards that are "inconsistent with standards established by the FCC."

requirements beyond those guidelines would be considered as inconsistent with national policy and would not be permitted. Future changes in the bulletin would be accomplished through a "public comment" process. These considerations aside, we believe that competition will provide subscribers with high quality CATV signals absent technical regulations.

11. Again, the Commission is not requiring nor recommending that local franchise authorities adopt or continue to include technical quality standards in franchise agreements. However, for those franchise authorities that choose to include such standards, portions or all of the referenced OST bulletin could be included in franchise agreements.

* * *

[SECTION ON SIGNAL LEAKAGE LIMITS DELETED]

Other Considerations

17. In making the above described changes to the Rules, it appears appropriate to make certain other editorial changes. We proposed to delete all of § 76.605 and 76.609. Section 76.601 would be rewritten in its entirety, to include all information relating to technical performance, required testing, and measurement procedures. The Appendix reflects these editorials.

Regulatory Flexibility Act--Initial Analysis

18. I. Reason for Action. CATV systems are currently required, on an annual basis, to show compliance with certain quality performance standards and with radiation leakage standards. In the area of quality performance, competition has increased significantly in the past decade. It therefore appears appropriate to allow the marketplace to set the

quality levels rather than to have them set by the Federal Government. Because of the potential adverse impact on other radio services due to excessive cable radiation, those rules must be maintained, but in a relaxed form.

II. The Objective. The rules herein proposed will allow CATV operators more flexibility to match quality performance to the demands of their subscribers.

III. Legal Basis. The action is in furtherance of sections 1, 302, 303, 304, 307, 308, 309, and 624 of the Communications Act of 1934, as amended (47 U.S.C. 151 et seq.).

IV. Description, potential impact on and number of small business affected. The rules herein proposed would eliminate quality performance standards for CATV systems and the requirement for annual quality measurements. Further, the new

rules would relax the signal leakage limitations. Both of these actions will result in a savings of workforce time and system operating costs for compliance with the regulations. It is nevertheless anticipated that most CATV systems will voluntarily continue with quality maintenance programs. Rule modifications as proposed could result in a savings of over 51,200 work hours.

All CATV systems will be positively affected by the actions. Reductions in the above described regulations translate directly into time and money savings. The television broadcasting industry could be negatively affected by the rule changes if the overall quality of CATV systems lessens. Of particular concern are the "must carry" television signals of over-the-air stations. The rule section requiring that these signals be carried without material degradation will be

retained to assure a minimum impact on the television industry. Although a decline in CATV quality is not anticipated, the Commission will be sensitive to feedback from broadcasters and the public as a result of the proposed actions.

V. Recording, record-keeping and other compliance requirements. None.

VI. Federal rules which overlap, duplicate, or conflict with this rule. None.

VII. Any significant alternative minimizing the impact on small entities and consistent with the stated objective. None.

Paperwork Reduction Act

19. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burden upon the public. Implementation of any new or modified requirement or burden

will be subject to approval by the Office of Management and Budget as prescribed by the Act.

* * *

[SECTION ON EX PARTE RULES DELETED]

Comment Period

21. Pursuant to applicable procedures set forth in § 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before March 29, 1985, and reply comments on or before April 15, 1985. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should

be sent to Office of the Secretary. Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, NW, Washington, D.C. 20554.

Actions

22. The Secretary shall cause a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 50 U.S.C. et seq.).

23. Authority for this action is contained in sections 1, 302, 303, 304, 307, 308, 309, and 624 of the

Communications Act of 1934, as amended (47 U.S.C. 51 et seq.).

24. For further information on this matter, contact Bernard Gorden, Mass Media Bureau, at (202) 632-9660.

(Secs. 4, 303, 48 stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission,

William J. Tricarico,

Secretary

Appendix

1. Title 47 CFR Part 76 of the Federal Communications Commission's Rules and Regulations is amended as follows:

PART 76--[AMENDED]

1. Section 76.55(a)(1) would be revised to read as follows:

§ 76.55 Manner of Carriage.

(a) * * *

(1) The signal shall be carried without material degradation in quality

(within the limitations imposed by the technical state of the art).

§ 76.601 [Removed]

2. Section 76.601 is removed in its entirety.

§ 76.605 [Removed]

3. Section 76.601 is removed in its entirety.

§ 76.609 [Removed]

4. Section 76.609 is removed in its entirety.

5. A new § 76.601 is added to read as follows:

§ 76.601 Technical requirements, measurements, and tests.

(a) The operator of each cable television system shall be responsible for ensuring that each such system is designed, installed, and operated in a manner that fully complies with the provisions of this subpart. Each system operator shall be prepared to show, on

request by an authorized representative of the Commission, that the system does comply with the rules.

(b) Signal leakage from a cable television system shall not exceed the following limits:

Frequencies	Leakage limit (uV/m)	Distance (meters)
54 MHz and below	150	3
54 + MHz to 216 MHz	50	3
Over 216 MHz	150	3

(c) Measurements to determine the field strength of radio frequency energy radiated by cable television systems shall be made in accordance with standard engineering procedures. Measurements made on frequencies above 25 MHz shall include the following:

(1) A field strength meter or other type of signal level display device of adequate accuracy using a horizontal dipole antenna shall be employed.

(2) Field strength shall be expressed in terms of the rms value of synchronizing peak for each cable television channel for which radiation can be measured. For other types of signals carried on cable systems, the rms value of field strength shall be determined, using an adequate bandwidth to encompass significant components of the signals.

(3) The resonant half wave dipole antenna shall be placed 3 meters from and positioned directly below the system components and at least 3 meters above ground. Where such placement results in a separation of less than 3 meters between the center of the dipole and ground level, the dipole shall be repositioned to provide a separation of 3 meters from the system components at a height of 3 meters or more above ground.

(4) The horizontal dipole antenna shall be rotated about a vertical axis and the maximum meter reading shall be used.

(5) Measurements shall be made where other conductors are 3 or more meters away from the measuring antenna.

(d) Although not required as performance parameters by this part, the technical specifications contained in Office of Science and Technology Bulletin may be included in local franchise agreements.

[FR Doc. 85-4617 Filed 2-25-85; 8:45 am]

BILLING CODE 6712-01-01

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of Technical and Operational Requirements of Part 76, Cable Television	)	MM Docket No. 85-38

TO: The Commission

COMMENTS OF THE CITY OF NEW YORK

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Date: March 29, 1985

[APPENDIX]

ATLANTIC RESEARCH CORPORATION
TELECOMMUNICATION CONSULTING

ENGINEERING STATEMENT

PART 76 OF THE FCC RULES

I. The technical standards in Part 76 of the FCC Rules and Regulations that define the cable system technical parameters for quality performance standards are inadequate for present day systems.

A. Among the eleven performance standards, four directly affect signal quality performance.[1] These standards are

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[1] The other seven performance standards, which primarily address the needs of a standard television receiver, are as follows: section 76.605(a)(1) sets the frequency boundaries of cable television channels, section 76.605(a)(2) sets the frequency tolerance of CATV visual carriers, section 76.605(a)(3) sets the frequency tolerance of CATV aural carriers, section 76.605(a)(4) sets the minimum visual carrier levels at subscriber terminals, section 76.605(a)(5) sets the allowable tolerance for visual carrier level variation within 24 hours,
[Footnote continued on next page]

as follows: section 76.605(a)(7) sets the maximum allowable level of visual low frequency distortion, section 76.605(a)(8) sets the frequency response of each channel, section 76.605(9) sets the allowable visual signal to system noise level and to any undesired co-channel signal, and section 76.605(a)(10) sets the allowable level of intermodulation distortion. These four standards have a direct effect upon the quality performance of the distributed signal.

B. The FCC quality performance standards which do exist are too low and

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[Footnote continued from previous page]
section 76.605(a)(6) sets the maximum and minimum aural carrier specifications with respect to visual carrier levels, and section 76.605(a)(11) sets the minimum amount of isolation between subscriber terminals. These standards are to assure that a standard television receiver will work with the cable system without causing adverse effects to the system, guards against adjacent channel interference within the receiver, and reduces the possibility of channel overloading within the system.

do not require what is practicably achievable in the industry today. The two most important quality standards are described in sections 76.605(a)(9) and 76.605(a)(10). Section 76.605(a)(9) requires that the visual signal level to system noise shall not be less than 36 dB; this is now more commonly referred to as the visual carrier to noise ratio (C/N). 76.605(a)(10) requires that the ratio of visual signal level to the rms amplitude of any coherent disturbances such as intermodulation products or discrete-frequency interfering signals shall not be less than 46 dB; this is now more commonly referred to as Composite Triple Beat (CTB).

1. A cable system operating with a C/N of 36 dB and a CTB of -46 dB would display pictures with a decided noticeable amount of random noise (snow) and moving herringbone and random line

patterns in the picture. It would be considered as unacceptable by consumers in any market except possibly one in which households were unable to receive any stations by ordinary reception means.

2. A well designed and properly operated and maintained cable system can achieve a C/N of 46 dB and a CTB of -55 dB (for non-coherent carriers) for most of the subscribers.

C. The FCC quality performance standards fail to address most current cable services and many important parameters.

1. There is no regulation of Class II, III, and IV signals. In many cable systems, these signals already constitute the largest number of the signals distributed on the cable system. Such services as local origination, public access, local government, educational access, FM broadcast, premium audio

programming, pay television services, pay per view television programs, home computer services, security monitoring, and data transmission services are completely left out of the present regulations.

2. In addition, many important parameters are not covered. Even if a cable system is operated with a C/N of 46 dB and CTB of -55 dB, the picture and sound performance could be completely unacceptable. This is because the parameters of C/N and CTB define the performance of the radio frequency (RF) signal after it has been modulated. Many impairments could happen to the baseband signals before and during modulation before they are connected to the distribution system as RF signals. Video transmission impairments can cause the hue of a color picture to change (e.g., faces become green), the picture becomes

unstable and rolls vertically or tears horizontally, the picture becomes noisy, images appear fuzzy or unclear, the color in the picture becomes saturated and very noisy, the color may partially or totally disappear, some parts of the picture may become smeared, the polarity of some parts of the image may become reversed (e.g., black become white, etc.), moving large bars appear in the picture, bright white noise pulses appear in the picture, and various combinations of horizontal and vertical lines appear in patterns in the picture. The degree of presence of these video impairments is measured and quantified by such parameters as differential phase, differential gain, luminance non-linear distortion, chrominance non-linear gain distortion, chrominance non-linear phase distortion, chrominance-to-luminance intermodulation, impulsive noise, random noise, signal to

noise ratio, field-time waveform distortion, line-time waveform distortion, short-time waveform distortion, chrominance-luminance gain inequality, chrominance-luminance delay inequality, gain/frequency distortion, synchronizing pulse non-linear distortion, periodic noise, crosstalk, signal amplitude, relative burst gain error, and relative burst phase error.

Audio transmission impairments can cause hum in the sound, hissing sound, crackling in the sound, distorted sound, too much bass relative to the high frequencies, not enough bass relative to the high frequencies, background noises that vary in loudness, buzzing in the sound, sound from other programming, and "telephone effect" sound (no bass or high frequencies in the sound). The degree of presence of these audio impairments is measured and quantified by such parameters

as frequency response, total distortion, intermodulation distortion, random noise, signal-to-noise ratio, crosstalk, signal amplitude, and peak noise level.

Data transmission impairments can cause errors to be introduced into the data or loss of data. The number $1,023.50 being received as $99,923.50 is an example of errors occurring in the transmission. The degree of presence of these data transmission impairments is measured and quantified by such parameters as random noise level, peak noise level, signal to noise ratio, bit error rate, jitter, envelope delay, signal level, impulse noise, frequency shift, harmonic distortion, frequency response, and dropouts.

Several years ago, the cable industry recognized that there was a need for performance standards much more definitive than the FCC technical standards.

Furthermore, these standards had to be supportive of a much higher quality of performance due to the changes in the cable industry and there needed to be some standard methods of measurement thereof. When the National Cable Television Association published its most recent recommended practices for measurements on cable television systems (copyrighted in 1983), it contained reference to such performance quality standards as differential gain, differential phase, and the use of vertical interval test signals. These are the same standards which have been used by the broadcast industry for years to evaluate the quality level of their performance for the same types of signals. However, even these most recent recommended standards do not address parameters for audio and data transmission.

D. It is not surprising that the FCC technical standards are inadequate.

1. The original purpose of a community antenna television system was to permit homes to receive television programming from stations which were too distant to be adequately received with normal home antennas. In 1972, it was logical to establish quality performance standaards based upon equivalent Grade B service fringe area reception. The normal system was little more than a headend consisting of high gain antennas on a hill and some amplifiers connected to a small distribution system; a system with 12 activated channels was considered to be a big system. Most of the programming was from local television stations located perhaps 50 to 100 miles away.

More distant stations were being imported by various microwave links and networks or in combination with

translators. Local origination consisted of a time and temperature channel and some advertising (frequently a series of cards on a rotating drum positioned in front of a small monochrome camera). Public access was practically unheard of unless a local university was involved in an instructional program and could provide suitable television production studio facilities. There was practically no interest in data transmission. Therefore, quality performance standards which saw community cable systems as small distribution systems passing standard television station signals through to standard home television receivers was appropriate in 1972. Also, since most systems were some distance away from the broadcast stations even substantial amounts of noticeable noise and distortion in the pictures and sound was of little concern because that performance

represented a considerable improvement over what the average household could otherwise receive.

2. A substantial number of changes have occurred in the cable industry since 1972. Many systems now carry more than 20 channels of television programming which are received by satellite transmission; many more are contemplated to be added. Satellites will be spaced closer and more signals will be encrypted; as a result, the possibilities of interference between the signals has greatly increased.

Terrestrial microwave systems used by telephone companies, utility groups, and cable systems have greatly increased in numbers. Some areas are so congested, that it is very difficult to add any additional microwave links in existing authorized bands. Higher transmission frequencies, narrower antenna beam widths,

and interference from other systems have placed increased demands on the operator to maintain high quality standards.

There is increasing interest to provide data transmission and interactive services; most new cable systems have some provision for two-way transmission of video, audio, and data. To be able to analyze this quality of data channels requires measurement and the evaluation of parameters such as bit error rate (BER), jitter, carrier to noise ratio (C/N), and path delays. Ingress of interference from outside the cable system has caused considerable errors to be introduced into the transmission in some systems. Standardization of parameters and methods of measurement is imperative at this time to enable proper transmission of data on cable systems.

It is not uncommon for new cable systems being built today to have 70 or

more activated channels available on the subscriber system alone; additional channels are carried on institutional and business systems. Signal levels and the balance between them become very important to avoid overloading amplifiers and causing increased intermodulation on one hand or allowing signals to be too low and causing increased system noise on the other hand.

Most television receivers in use today are color, whereas in 1972 most were monochrome. Color television transmission requires more stringent technical parameters. It is possible for a monochrome transmission to appear perfect but when a color signal would be attempted to be transmitted, it would be completely unacceptable. To insure the proper transmission of color television signals requires the proper operation of such parameters as chrominance-luminance gain

inequality, chrominance-luminance delay inequality, chrominance non-linear gain distortion, chrominance non-linear phase distortion, and chrominance-to-luminance intermodulation.

To further reflect the degree of changes that have occurred in the cable system industry, even the name for a modern large cable system has been changed; they are now frequently being referred to as a broadband communications system or network.

In 1977 certain FCC technical standards were clarified and modified by the FCC. Standard 76.605(a)(9) for carrier to noise ratio (C/N) and carrier to co-channel interference was clarified. The clarification defined the standard to only apply to transmission of a station signal once it is received by the cable system or delivered to subscribers inside the Grade B contour of broadcast stations.

Standards 76.605(a)(2) frequency tolerance and frequency stability, and 76.605(a)(6) ratio of visual signal level to aural signal level were modified to be consistent with converter usage and to reduce the possibility of adjacent channel interference in some systems. These changes did not materially affect the need for increased quality and quantity of performance previously discussed.

E. Cities need and want realistic standards in the cable franchises which they grant to cable systems. Once a cable television system is constructed, the major problem encountered by the franchising authority universally revolves around the number of complaints received by the municipal cable administration. These complaints reported to the cable administration, or in most smaller municipalities, the cable administrator, concern reliability and quality of

service. The only recourse to a municipal franchising authority to resolve the complaints, or to determine what are the problems, is to check the cable system by determining if the cable system is meeting current FCC technical standards and any municipal technical specifications included in the effective franchise agreement. Our experience has shown that when realistic performance standards are a part of the franchise agreement that complaints can be resolved more easily and that both the municipal franchising authority and the cable system benefit.

ATLANTIC RESEARCH CORPORATION'S EXPERIENCE IN CABLE TELEVISION

Atlantic Research Corporation's telecommunications' qualifications are based upon 54 years of communications experience serving Federal, State and local governments, industry and institutions. Atlantic Research's experience in communications goes back to 1930, when Jansky & Bailey, Consulting Radio Engineers, a predecessor to Atlantic Research, was one of the first engineering firms to represent broadcast clients before the Federal Radio Commission (precursor of the Federal Communications Commission). Since that time, Atlantic Research has developed a record of successful communications system designs and services for clients throughout the world. For example, Atlantic Research has performed contract services for 26 of the 50 states in connection with Educaticnal

Television, and has recently engaged in the design and construction of medically related voice, data and video systems in six states.

Atlantic Research Corporation's cable experience includes projects from franchise proposals to operating systems. ARC has consulted with respect to developing CATV facilities including head end site selection, system specifications, franchise advice, cable problems and claim adjusting. Technical and operational evaluation of existing systems to assist in fair market value determination were performed and system proof-of-performance measurements were conducted. ARC's clients have included more than 40 municipalities. More recent clients and projects include the CATV and Institutional Cable Systems for New York City, New York (Bronx, Brooklyn, Queens and Staten Island); Cleveland, Ohio;

Miami, Florida; Dallas, Texas; Palo Alto, California; Wheaton, Illinois; Austin, Texas; and Ft. Worth, Texas.

Other fields of telecommunications specialization at Atlantic Research include Microwave Systems, Urban Communications, Emergency Medical Service (EMS) Communications, Local Government Commercial Mobile Radio Communications, Cellular Radio, Commercial Radio and Television Broadcast, and Broadband Communications Systems.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Review Technical and	)	MM Docket
Operational Requirements of	)	No. 85-38
Part 76, Cable Television	)	

COMMENTS OF SACRAMENTO, MONTGOMERY COUNTY, CINCINNATI, SCOTTSDALE AND ST. LOUIS

MILLER & YOUNG
1150 Connecticut Avenue
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March 29, 1985

[APPENDIX]

SACRAMENTO METROPOLITAN
CABLE TELEVISION COMMISSION
SACRAMENTO, CALIFORNIA

ENGINEERING STATEMENT CONCERNING THE CONTINUING NEED FOR CABLE TELEVISION TECHNICAL STANDARDS AND THE INADEQUACY OF PRESENT FCC CABLE TELEVISION TECHNICAL STANDARDS

March 22, 1985

Hammett & Edison, Inc.
Consulting Engineers
San Francisco

SACRAMENTO METROPOLITAN CABLE TELEVISION COMMISSION SACRAMENTO, CALIFORNIA

STATEMENT OF DANE E. ERICKSEN, CONSULTING ENGINEER

The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by the Sacramento Metropolitan Cable Television Commission (SMCTC) to prepare an engineering statement in response to Mass Media Docket 85-38, concerning the continuing need for cable television technical standards and the inadequacy of present FCC cable television technical standards.

REASONS FOR CONTINUED TECHNICAL STANDARDS AND ADDITIONAL TECHNICAL STANDARDS FOR CABLE TELEVISION SYSTEMS

A basic premise of Docket 85-35 is that effective competition exists between cable television services, and that marketplace forces will therefore insure adequate technical quality. It is my considered professional opinion that this

argument is flawed for the following reasons:

1. Subscribers will not have a free marketplace choice between competing cable television companies. The forces of the marketplace, which normally insure reasonable quality, are blunted in the case of cable television services. In the foreseeable future, most residents of Sacramento will not have a choice between competing cable television companies and, therefore, cannot exercise the traditional free-marketplace option of taking their business elsewhere, should they be offered unsatisfactory picture quality.

2. Non-cable video services are not comparable in scope and cost to cable services. While there exist competing video services to cable television, such as direct over-the-air television signals, private satellite receive-only stations (TVRO's), Multipoint Distribution Service

(MDS), Satellite Master Antenna Television Systems (SMATV's), and video tape recorders (VTR's), none are available to all residents in an imposed service area, as cable television services are. Only cable television provides a full complement of local broadcast signals, satellite signals, and local origination programming, and does not suffer from limitations in antenna placement or poor reception. Over-the-air television signals, TVRO's, and MDS cannot provide effective competition in those residences where outside antennas are not allowed or adequate reception is not possible. VTR's and TVRO's are not feasible alternatives for those in lower income brackets. Effective competition requires that there be competing cable systems, not merely competing video services.

3. FCC ignores negative marketplace forces. The "marketplace" argument

presented in Docket 85-38 ignores a marketplace force which has a negative impact on signal quality: the incentive which the cable operator has to cut costs in order to optimize profits. Cable television signal quality can become seriously degraded before widespread subscriber cancellations occur. Optimum profit conditions are possible, because of the effective monopoly, when service is barely tolerable to the largest number of subscribers. Reasonable minimum technical standards are a counterbalance to the dark side of marketplace forces.

4. FCC argument is inconsistent. Docket 85-38 is inconsistent in its logic. On the one hand it argues that marketplace forces are adequate for insuring good signal quality (Docket 85-38, at paragraph 7), but on the other hand it finds that a Federal standard for mandatory-carriage Class I signals is

still needed (ibid, at paragraph 9). If marketplace forces were truly adequate, there would be no need for privileged treatment of Class I mandatory carriage signals. However, we agree that Class I mandatory carriage signals are in need of a Federal standard of "carriage without material degradation" (the present 47 C.F.R., Section 76.55(a)(1)). The FCC proposal to keep a Federal standard for mandatory carriage Class I signals is prima facie evidence that marketplace forces are inadequate to insure adequate cable television signal quality. The FCC standards should remain in force, if not be augmented.

5. Class I signals are a minority on modern cable systems. With the exception of signal leakage, the present FCC cable television technical standards apply only to Class I signals. When these standards were adopted in 1972, the majority of

cable television signals were Class I signals. Class II signals, when present, often consisted of a simple black and white camera scanning weather instruments. Today's modern cable system typically provides 30 to 80 channels, of which a minority are Class I signals. This is a significant loophole in the 1972-vintage standards; we strongly recommend that the FCC cable television technical standards be expanded to apply to Class II signals and to video Class III signals, after descrambling.

6. Depth-of-modulation standard is badly needed. There is presently no cable television technical standard for visual or aural modulation for systems which remodulate video or audio signals onto a radio frequency (RF) carrier. While in 1972 few cable television systems utilized techniques which required the modulation process, modern cable systems make

extensive use of modulators. Video and audio outputs from satellite receivers, FM microwave systems, FM supertrunks, character generators, and local origination cameras, must all be modulated onto RF carriers. Some set-top convertors include a remodulation process.

It has been my consistent experience that improper depth of modulation is a significant source of degraded signal quality. The resulting defects either are poor contrast for the undermodulated case, or "sync buzz" for the overmodulated case. With their present method of operation, each cable system is equivalent to a large number of small television transmitters. The Commission would scarcely permit transmitters to operate with no modulation limits. A depth-of-modulation standard is sorely needed.

7. <u>FCC records document the continued need for standards</u>. The files of the FCC

confirm the need for cable television technical standards, document the need to extend the present standards to Class II and Class III signals, and document the need for a depth-of-modulation standard. For examples, see:

Teleprompter of Sierra Madre (Field Operations Bureau (FOB) Case 82-I-118/SF-81-150)
Jim R. Smith Cable Company of Sierra Vista (FOB Case 82-I-334/DA-82-54)
WGN Electronics (FOB Case SF-81-194)
Visual Enterprises Venture (FOB Case SF-81-80)
Rialto Cable TV (FOB Case SF-81-81)
North County Cablevision (FOB Case SF-81-104)
Bishop Cable TV (FOB Case SF-81-122)
Warner Cable of Barstow (FOB Case SF-81-178)
Sierra Video Cable (FOB Case SF-81-102)
Foley & Associates CATV, Norton AFB, California
Cable Antenna Systems, Vandenberg AFB, California
Coachella Valley Cable TV, Coachella, California
Sammons Communications CATV, Glendale, California
Storer Cable TV of Thousand Oaks, Thousand Oaks, California
Teleprompter of Yucca Valley, Yucca Valley, California

Fremont Cable TV, Fremont, California
Teleprompter of Oakland, Oakland, California
Douglas CATV, Douglas, Arizona

All of the above FCC cable television inspection cases were triggered by complaints from the public. They document the failure of marketplace forces to insure good quality. These cases also demonstrate the prevalence of degraded Class II and Class III signals, and the degraded quality due to depth-of-modulation errors.

The Teleprompter of the Sierra Madre case in particular demonstrates the need for continued standards and the failure of marketplace forces to deal with a monopolistic situation. Sierra Madre is an affluent community in the Los Angeles basin. If the FCC premise of marketplace competition for cable television services were valid, the residents of Sierra Madre should enjoy some of the best cable

service in the nation. Yet this case documents extensive complaints to local officials, the inability of those officials to obtain corrective action from the cable company, and an FCC inspection which found multiple technical violations, including carriage with material degradation and gross depth-of-modulation errors. Only after the FCC enforcement action did the cable operator improve its service to acceptable levels.

8. Experience of Hammett & Edison supports need for standards. The firm of Hammett & Edison, Inc. has long been concerned over the need for technical standards for cable television signals. In November 1969, when no such standards existed, Hammett & Edison took the initiative and petitioned the FCC to establish standards for cable television systems (RM-1520). The petition resulted in Docket 18894, (25 F.C.C. 2d 38) and the

subsequent adoption of minimum technical standards for cable television systems (Cable Television Report and Order, February 2, 1972, 36 F.C.C. 2d 143).

In recent years Hammett & Edison has been retained by numerous municipalities to conduct tests of cable television system performance and to assist in correcting various performance deficiencies, some of which were quite serious, in existing cable systems. Our experience has made it clear that more extensive technical standards, applicable to Class II and III signals as well as Class I signals, are both needed and appropriate for certain cable television systems, such as that now under construction in Sacramento.

9. FCC standards were intended to be upgraded. When the FCC adopted minimum technical standards for cable television systems in 1972, it stated, "Our technical

standards provide only a start. They will be expanded to meet changes in the state-of-the-art." (Reconsideration of Cable Television Report and Order, 36 F.C.C. 2d 359, at Paragraph 91.) In the 13 years since the FCC adopted these standards, Section 76.605 of the FCC Rules has not been expanded in its scope and the technical standards have not been significantly modified. At the same time, major improvements have been made in cable television hardware and systems design. The cable television state-of-the-art is capable of meeting a depth of modulation standard and is capable of extending Class I standards to Class II and Class III signals.

10. Carrier-to-noise standard is inadequate. The 36 dB carrier-to-noise standard now applicable to Class I signals first picked up within the predicted Grade B contour is no longer a reasonable

minimum standard. Modern cable television systems are capable of meeting a 40 dB carrier-to-noise ratio.

A 36 dB carrier-to-noise ratio will result in "marginal" to "passable" picture quality (TASO 4 to TASO 3) by 90% of viewers, whereas a 40 dB carrier-to-noise ratio will result in "fine" to "passable" quality (TASO 2 to TASO 3) by 90% of viewers.[1] A 40 dB carrier-to-noise standard should be adopted to insure reasonable quality service to cable television subscribers.

DOCKET 85-38 INCORRECTLY STATES THE PRESENT STATUS OF SECTIONS 76.605(a)(9) AND 76.605(a)(10)

At Paragraph 4, Docket 85-35 states that Section 76.605(a)(9), concerning undesired co-channel television signals

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1 "The Relationship between the NCTA, EIA, and CCIR Definitions of Signal-to-Noise Ratio," IEEE Transactions on Broadcasting, Vol. BC-20, No. 3, September 1974.

operating on proper offset, and Section 76.605(a)(10), concerning discrete frequency interfering signals, have never been implemented. This is incorrect. What was never implemented was the requirement to measure these parameters during annual performance tests (see note following 47 C.F.R., Section 76.601(f)). The standards themselves must be met, and are currently enforced by the FCC Field Operations Bureau Engineering Measurements Units.

IMPACT OF DOCKET 85-38 ON CABLE TELEVISION SERVICE IN SACRAMENTO

The franchise agreement between SMCTC and Sacramento Cable Television (SCT) for a cable television system to serve the cities of Sacramento, Folsom, and Galt, and the County of Sacramento, contains standards exceeding those in the FCC Rules and also regulates additional parameters not covered by the Rules. The proposed

downgrading of cable television technical standards to guidelines, and the proposed pre-emption of local standards which exceed those guidelines or apply to areas not included in the guidelines, strikes at the heart of the cable television system now under construction in Sacramento.

STANDARDS INTEGRAL TO SYSTEM DESIGN

The specific system design proposed by SCT is a sophisticated combination of distant and local off-air reception, satellite reception, local origination, microwave facilities, multiple hubs, upstream and downstream communications, and return supertrunk cables. The standards adopted in the Sacramento franchise are essential to permit SMCTC to monitor and regulate the system operation and to insure that a high quality of delivered services will be maintained.

PROPOSED PRE-EMPTION WOULD RESTRICT ABILITY TO APPLY STANDARDS TO NON-VIDEO CLASS III SIGNALS AND TO CLASS IV SIGNALS

The proposal to pre-empt local standards would limit the ability of franchising bodies to enforce standards for non-video Class III signals or Class IV signals (for example, data transfers between dedicated users on an Institutional Network (I-NET). The Sacramento cable television Resolution contains references to standards adopted by EIA, ANSI, CCITT and AT&T (for example, EIA Standard RS-232-C and the AT&T standard for T-1, 1.554 megabit data carriers) for data transfers between City and County users.

While limiting a large, modern cable television system to just the present FCC technical standards would most likely still result in a working cable television system, albeit at less quality than negotiated during the franchising process,

such a limitation could make the difference between a working I-NET and a useless I-NET. Since many municipalities, including Sacramento, have negotiated a commitment for an I-NET, and since the monopolistic nature of cable television precludes effective competition from other cable companies, local governments need the ability to enforce reasonable technical standards for non-video Class III and Class IV signals to insure adequate service.

LOCAL STANDARDS SHOULD BE ALLOWED IF FEDERAL STANDARDS ARE ELIMINATED

In the event that the present FCC cable television technical standards are downgraded to guidelines, the FCC should not pre-empt stricter or additional local standards where:

1. The standards were supplied by the cable television operator,

2. The standards were incorporated into the franchise document and agreed to by the cable television operator,
3. The franchising body has the capability to enforce the standards.

These three conditions will effectively answer the six FCC concerns expressed in Docket 20018 (49 F.C.C. 2d 470), which concerned FCC pre-emption of cable television technical standards:

1. Insure the availability of cable services at reasonable cost,
2. Encourage broad technical expertise,
3. Encourage standardization of test equipment and measurement techniques,

4. Insure compatibility with mass produced cable television equipment,
5. Insure compatibility for national and regional interconnects,
6. Insure compatibility for publicly owned terminal equipment.

SIGNAL LEAKAGE LIMITS

The relaxed signal leakage limits proposed at Paragraph 16 appear reasonable. The requirement in Section 76.613 that actual cases of interference be promptly and effectively eliminated is a sufficient safety valve for any

interference which may be caused by the new standards.

HAMMETT & EDISON, INC.
Consulting Engineers

/s/
Dane E. Ericksen, P.E.

March 22, 1985

AFFIDAVIT

State of California)
) ss:
County of San Mateo)

Dane E. Ericksen, being first duly sworn upon oath, deposes and says:

1. That he is a qualified engineer employed in the firm of Hammett & Edison, Inc., Consulting Engineers, with offices located near the city of San Francisco, California.

2. That he graduated from California State University, Chico, in 1970, with a Bachelor of Science Degree in Electrical Engineering, was an employee of the Field Operations Bureau of the Federal Communications Commission from 1970 to 1982, with specialization in the areas of FM and television broadcast stations and cable television systems, is a Registered Professional Engineer in the State of California, and has been associated with

the firm of Hammett & Edison, Inc. since October 1982.

3. That the firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by the Sacramento Metropolitan Cable Television Commission (SMCTC) to prepare an engineering statement in response to Mass Media Docket 85-38, concerning the continuing need for cable television technical standards and the inadequacy of present FCC cable television technical standards.

4. That he has carried out such engineering work and the results thereof are attached hereto and form a part of this affidavit.

5. That the foregoing statement and the report regarding the aforementioned engineering work are true and correct of this own knowledge, except such statements therein made on information and belief,

and as to such statements, he believes them to be true.

Dane E. Ericksen, P.E.

Subscribed and sworn to before me this 22nd day of March, 1985

Original Copy Notarized

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Technical	)	MM Docket No. 85-38
Operational Require-	)	
ments of Part 76,	)	
Cable Television	)	

TO: The Commission

COMMENTS OF
CAPITAL CITIES CABLE, INC.

David R. Anderson
Mitchell Lazarus

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202)872-6000

Counsel for Capital Cities
Cable, Inc.

March 29, 1985

APPENDIX A

Examples of
Technical Requirements in
Current Franchises

CHANNEL CAPACITY AND SYSTEM DESIGN

12. Technical Standards

SYSTEM TECHNICAL SPECIFICATIONS

1. GENERAL

a. The cable system as specified herein shall include all necessary electronic equipment, power supplies, connectors, and other parts, components and equipment necessary to provide a complete and operational system with the frequency range of 50 to 400 MHz.

b. All maps shall adhere to Omnicom's mapping requirements as follows:

(1) Map size of 24" x 36"

(2) Scale of 200 feet = 1 inch

(3) symbols used for equipment and cable shall be in accordance with OMNICOM, NCTA, and IEEE standards.

c. System performance will meet or exceed the standards set forth in Part 76, subpart K of the F.C.C. rules and regulations.

d. The system shall be rated for continuous 24-hour service in an environment of up to 100 percent humidity (rain) and of temperatures from -20°F to +120°F.

e. The system shall be capable of delivering all NTSC color and monochrome signals to standard EIT television receivers, both monochrome and color, and FM receivers without modifications. The signals shall be distributed to individual subscribers' television sets without noticeable degradation of color fidelity or picture modulation interference in excess of the attached electrical specifications.

f. The system shall not interfere with radio and/or television reception of non-subscribers.

g. All active circuitry in the equipment used shall be solid state, and equipment shall be provided with electronic components for lightning and surge protection. Fuses or circuit breakers shall be provided for in all active taps or line extenders for protection of the equipment from damage due to overload or excessive heat. Automatic-recycling breakers

shall not weld or change performance parameters when subjected to long-term, high-current operating conditions.

h. All equipment shall be powered by a 60 VAC waveform with a crest factor not to exceed 1.1 to 1, or 60 volts RMS. This AC voltage may be multiplexed on the coaxial cable or brought directly into the trunk amplifier. AC power insertion shall be made in a manner such that a minimum of 100 dB isolation shall exist between the RF and AC paths at all frequencies within system passband.

i. Lightning arrestors shall be installed on 110 VAC lines of AC power supplies.

j. Remote power supplies for powering of electronic equipment shall be so regulated that AC output voltage does not vary by more than ± 2% with an input voltage range of 90 to 130 volts AC. The power location shall not generate transients when energized that may prove harmful to the system equipment and components.

k. All outdoor equipment except AC power supplies shall be housed in weatherproof, rugged, cast

aluminum housings which are fully protected against corrosive elements of the atmosphere. AC power supplies shall be housed in a protective sheet-metal housing.

l. All equipment shall be equipped with coaxial cable fittings of positive moisture protection and effective electrical connection. Trunk line amplifiers, bridging amplifiers and line extender amplifiers shall be contained in weatherproof housings capable of strand mounting.

m. Connectors shall be of the integral-mandrel-sleeve type to provide positive clamping of the outer sheath. The connector must guarantee a minimum of 100 dB of isolation between any external RF field and the internal cable signal at all frequencies within the system passband to the system. The isolation will not degrade beyond 80 dB under any or all specified environmental, chemical or mechanical condition.

n. Signal ingress into the system shall be greater than 60 dB down from the nearest carrier. System active and passive components (excluding connectors

and subscriber-tap system) shall provide a minimum of 100 dB of isolation between any external RF field and the internal cable signal at all frequencies within the system passband during any and all environmental conditions pertinent to the system. The isolation shall not degrade beyond 80 dB under any or all specified environmental, chemical or mechanical conditions.

o. There shall not be more than two line extender amplifiers in cascade.

p. System installation construction, and configuration shall be in accordance with all applicable local and national electrical and safety codes.

2. MINIMUM PERFORMANCE STANDARDS

The specifications listed in this section are the minimum performance standards to which the system is guaranteed to perform under the following conditions:

a. 52-channel carriage, minimum.

b. At any subscriber's TV set.

c. On the hottest and coldest days of the year.

The specifications shall exceed the technical standards of the Federal Communications Commission, and the safety standards of the National Electrical Code.

The tests for the specifications are included at the end of the section. General viewing standards of excellence and good practice will also always be used.

3. HEADEND SPECIFICATIONS

The state-of-the-art processing equipment in the headend shall be of two basic types.

a. Heterodyne Processors - Receive the off-air channels and convert them to the appropriate channels and levels for carriage on the cable system plant.

b. Modulators - Receive the video and audio inputs from sources such as the satellite signals received by the earth station; automated weather and news; signals received from the local origination studio, etc.

c. Headend and satellite-receive stations shall be equipped with emergency power generation equipment which shall be activated automatically in the event of commercial power failure.

SPECIFICATIONS FOR PROCESSED SIGNALS

Signal-to-Noise:	49 dB, min. where input S/N = 51 dB or better
AGC:	+ 1.0 dB for +25 to -15 dB = 40 dB range
Spurious Output:	Down 60 dB, min., including adjacent carriers

Frequency Response: ± 1/2 dB from .75 MHz below to 4.2 MHz above video carrier

Group Delay: ±25 Nanosecs between video and color carriers

Frequency Accuracy: within FCC limits.

4. SUBSCRIBER TRANSPORTATION SYSTEM

The subscriber transportation system shall be single trunk, single feeder cable type, capable of bi-directional operation. The transportation system shall be capable of transmitting a minimum of 52 NTSC composite video-color-sound channels plus the complete FM band in the forward direction in the frequency band of 50-400 MHz, plus the capability of reverse transmission in the frequency band of 5-50 MHz.

All amplifiers shall be solid state push-pull equipment. All passive equipment shall have a passband from 5-400 MHz inclusive and be capable of bi-directional operation.

a. Forward Subscriber System Specifications: These specifications are based upon the longest cascade of 20 trunk amplifiers, plus one bridge amplifier and two line extenders:

1) Descrip: Signal Level (75 ohms)

Req'd. Specs: 5 dBmV

FCC Limits: 0 dBmV

Just Viable: 0 dBmV

2) Descrip: Frequency Band

Req'd. Specs: 50-400 MHz

Page 14 cont'd.

FCC
Limits: -

Just
Viable: -

3) Descrip: Signal Level variation from -40^0F to $+140^0$F
   a. to any trunk amplifier
   b. to any subscriber

Req'd. a. ±1.6 dB
Specs: b. ±3.0 dB

FCC a. -
Limits: b. ±12 dB

Just a. -
Viable: b. ±6 dB

4) Descrip: Signal-to-Noise ratio

Req'd.
Specs: 43 dB

FCC
Limits: 36 dB

Just
Viable: 40 dB

5) Descrip: Cross modulation below carrier

Req'd.
Specs: -51 dB

Page 14 cont'd.

FCC
Limits: 46 dB

Just
Viable: 46 dB

6) Descrip: Second order products

Req'd.
Specs: -

FCC
Limits: -

Just
Viable: -

7) Descrip: Third order (composite triple beat) below carrier

Req'd.
Specs: -51 dB

FCC
Limits: -46 dB

Just
Viable: -46 dB

8) Descrip: Power (hum) modulations below carrier

Req'd.
Specs: -40 dB

FCC
Limits: -26 dB

Page 14 cont'd.

Just
Viable: -26 dB

9) Descrip: Frequency response
a. single channel
b. trunk band response

Req'd. Specs: a. ±1 dB
b. ±3.5 dB

FCC Limits: a. ± 2 dB
b. ±12 dB

Just Viable: a. -
b. -

10) Descrip: Radiation

Req'd.
Specs: Exceed FCC

FCC
Limits: FCC

Just
Viable: 76.605

11) Descrip: All other interferences such as ghosts, co-channel

Req'd.
Specs: 46 dB

FCC
Limits: 46 dB

Just
Viable: 46 dB

Page 14 cont'd.

12) Descrip: Group delay at Channel 2

Req'd.
Specs: 100 nsecs.

FCC
Limits: -

Just
Viable: 150 nsecs.

13) Descrip: Subscriber tap isolation

Req'd.
Specs: 25 dB

FCC
Limits: 18 dB

Just
Viable: -

14) Descrip: Return loss

Req'd.
Specs: 16 dB

FCC
Limits: -

Just
Viable: -

b. Reverse subscriber system specifications:

1) Descrip: Frequency band
Specs: 5-30 MHz

2) Descrip: Frequency response
Specs: N/10 + 1 dB

3) Descrip: Maximum number of TV channels, equivalent
Specs: 4

4) Descrip: Cross-modulation below carrier
Specs: -69 dB

5) Descrip: Second order below carrier
Specs: -65 dB

6) Descrip: Signal-to-Noise ratio
Specs: 46 dB

7) Descrip: Group delay T-8
Specs: 100 nsecs.

c. FM specifications:

1) Band width 88-108 MHz

2) All signals shall be individually processed

5. SUBSCRIBER INSTALLATIONS

a. All subscriber taps shall be of the directional-couple type with either 2, 4, or 8 outputs.

b. In the forward distribution system at balance temperature, a minimum level of +9 dBmV at the highest design frequency and +6 dBmV at 54 MHz shall be maintained at the subscriber tap outputs (subscriber drop inputs). The maximum level at the highest design frequency shall not exceed +15 dBmV.

c. Plant shall be designed for dedicated facilities: A tap output shall be provided for each possible subscriber shown on strand maps at the time of system design. Any additional taps will be handled on a field change work order following design approval.

d. Terminating resistors and/or weatherproofing shall be provided on all outputs of each subscriber tap.

e. The system shall be designed to allow directional couplers to be located at points capable of supplying signals to apartments, hospitals, institutions,

multiple dwelling and non-standard residential subscribers at +12 dBmV or more at the tap leg output.

EQUIPMENT SPECIFICATIONS

A. ACTIVE ELECTRONICS:

All components of the television cable system must fulfill two functions in order to achieve customer satisfaction:

1. Highest possible technical performance (best electrical operation).

2. Longest possible operating life (greatest time between failures).

All active equipment shall utilize integrated-circuitry housed in modules. This feature greatly improves continuation of subscriber service since modules can be replaced quickly for either preventive or demand maintenance. The modules, contained in a radiation-and-weatherproof housing, use positive hold-down devices and large contact areas to guarantee efficient heat transfer.

Test points will enable levels to be checked without system interruption. Levels will be recorded inside the amplifier cover as well as in the system log book.

Automatic gain control amplifiers shall be adjusted to have a minimum of 4 dB of reserve gain on a typical day. This will enable the amplifier to maintain its output level within 1 dB of specification, automatically.

Line extenders may have thermal compensation circuits which act in conjunction with the trunk AGC design to stabilize signal levels.

B. COAXIAL CABLE

The coaxial cable used in the system shall be the latest field-proven type of aluminum-sheathed cable. The center conductor shall be copper or copper-coated aluminum.

1. The cable electrical specifications are:

a) Descrip: Operating Frequency
Spec: 5-400 Hz

b) Descrip: Impedance
Spec: 75 Ohms

c) Descrip: Return Loss
Spec: 30 dB minimum

d) Descrip: Temperature coefficient
Spec: ±% per 10^0F ambient variant

e) Descrip: DC loop resistance per 1,000 feet, typical
Spec: 0.75 ohms, max.

f) Descrip: Current capacity
Spec: 25 amperes

g) Descrip: Maximum voltage
Spec: 5,000 volts

h) Descrip: Shield isolation
Spec: 100 dB, in.

2. The trunk cable mechanical specifications are:

a) Descrip: Minimum bending radius
Spec: 10 inches or more

b) Descrip: maximum pulling tension
Spec: 420 pounds

C. PASSIVE COMPONENTS

All of the devices used throughout the system for signal routing, with the exception of amplifiers, are here called passive components.

The AC power supplier shall not only be regulated but shall incorporate time-delay relays and surge arrestors to guard the amplifiers against over-voltage conditions.

All other passive devices shall be protected with a resin coating and chromate.

Electrical specifications for passive components are:

a) Descrip: Frequency Range
Spec: 400 MHz

b) Descrip: Return loss
Spec: 18 dB, min., all ports

c) Descrip: Mechanical coating
Spec: Resin plus chromate, or equal

All components shall incorporate special shields to maintain the shielding integrity of the amplifier housing and the cable.

D. SUBSCRIBER DROPS

The cable used for the connection from the directional tap to the subscriber's TV set shall be bonded foil with at least 60 percent an aluminum braid over the foil. Any home spaced more than 100 feet from the tap shall be served by a drop cable having a self-contained messenger wire.

All subscriber drops shall be grounded in accordance with standard practices which are in conformance with the National Electric Code (N.E.C.) and Omnicom standard practices.

E. EMERGENCY ALERT EQUIPMENT

Emergency alert equipment shall be similar to CADCO, Scientific Atlanta or equivalent. This equipment shall preempt programming on all cable channels with both audio and video override. City officials may use this equipment to broadcast emergency instructions to residents in the event of civil disaster. The equipment is normally activated via a special phone located at Police Headquarters or at any other designated city facility.

Emergency messages can also be placed on channels which are normally unused in order to receive night-time warnings of storm, tornadoes, etc., from the National Weather Service.

STANDARD TOOL & EQUIPMENT ISSUE
*Technical Department Only

Mfg.	Description	Model
Jerrold	*Field Strength Meter	727
	*UHF Adapter for 727	UHF727
	*Super Band Adapter	SB727
	*Test Probe-JV-300	JPD-30
	*Test Probe-JV-300	MG-61F
	*Test Probe-JV-300	PMG-61F
	*Test Probe-JV-300	JTC-12
	*Test Probe-Starline	SPD-30
	*Test Probe-Starline	PGF
	*Test Probe-Starline	GFA
	*Test Probe-Starline	CMT
Sony	*Color Test Set	
	*Volt-Ohm Meter	
Bashlin	Linemans Belt	
	Safety Strap	
	Gaffs	
	Tool Bucket	23
	Tool Pouch (small)	
	Utility Pouch (leather)	
	30' Hand Line	
	Hard Hat	
Sears	Rain Gear	
	Hand Lantern	
Crafts	Tool Box w/Lock	
	Claw Hammer	
	Hacksaw	
	7/16 Combination Wrench	
	1/2" Combination Wrench	
	12" Adjustable Wrench	
	8" Adjustable Wrench	

Mfg.	Description	Model
Snap-on	7/8" Flare Nut Wrench	
	1" Flare Nut Wrench	
	1 1/4" Flare Nut Wrench	
	Torque Wrench	
	3" Extension	
	5/16 Socket	
	7/16 Socket	
	1/2 Socket	
	3/4" Flare Nut Wrench	
	9" Linemans Pliers	
Klein	9" Linemans Pliers	
	Needle Nose Pliers	
	Diagonal Cutters	
	10" Channelloks	
	Tubing Cutters	
	Electricians Knife	
	1/4" Nutdriver	
	5/16" Nutdriver	
	7/16" Nutdriver	
	1/2" Nutdriver	
	9/16" Nutdriver	
	3 lb. Hammer	
	4" Screwdriver	
	3" Screwdriver	
	Pocket Screwdriver	
	#1 Phillips	
	#0 Phillips	
	#0 or #1 Square Head Dr.	
Jerrold	Coring Tool 750	CPT-750
	Coring Tool 500	CPT-500
	Coring Tool 412	CPT-412
	Hex Crimp Tool	
	Wooden Forms	

Mfg.	Description	Model
LRC	Locking Terminator	
RMS	Locking Terminator	
Eagle	Security Shield Tool	
HBO	5-Sided Driver	
Sears	Electric Drill	

* * *

SECTION 12. TECHNICAL STANDARDS

A. Grantee shall comply with the Federal Communications Commission (FCC) Rules and Regulations, Part 76, Sub-part K (Technical Standards). However, to accommodate interactive and other state-of-the-art services as they become technically and economically feasible, augmentation of FCC standards, as required herein, are considered necessary. To meet system design objective, the following referenced specifications will also apply, unless exception is agreed upon between the City and the Grantee.

1. Applicable City, County, State and National/Federal Codes and Ordinances and regulations;

2. Applicable Utility joint pole attachment practices;

3. National Electrical Safety Code, NFPA No. 70.

The system shall be designed and constructed to meet all applicable technical performance specifications and standards over a temperature range of ±50 degrees F from the mean temperature of the Modesto area, and to function in all expected environmental extremes.

Performance Standards definitions and measurements shall be in compliance with National Cable Television Association (NCTA) manual 741: Signal Leakage and Interference

Control, and NCTA Standards 008-0477: Standards of Good Engineering Practices for Measurements on Cable Television Systems.

B. The technical performance specifications contained in the following subsections, above and beyond the FCC minimum specifications, are provided as minimum standards for system performance in the provision of interactive services, when offered. The combined forward trunk and distribution system should deliver signals to each and every subscriber's receiver that will meet or exceed the technical specifications, listed below, at the local mean temperature ±50 degrees. This should include the effects of drop cables, interior splits, and any terminal equipment such as descramblers and set top converters.

* * *

PERFORMANCE TESTS

1. Procedures for Testing

* * *

2. Test Equipment to be Used

Equipment	Manufacturer
Comparator	Texscan
Sweep Generator	Texscan
Oscilloscope	Tektronix
Signal Generator-VHF-UHF	Texscan
Noise Filters	Tektronix
Cable Equalizers	Fabricate
Detector	Texscan
NTSC Signal Generator, 147A	Tektronix
Dipole Antenna	Texscan
75/50 Ohm Matching Transformers	HP
Bandpass Filters	Jerrold
Spectrum Analyzer	HP
Tracking Generator	HP
Frequency Counter	Tektronix
Power Meter	HP
Waveform Monitor	Tektronix
Television Receivers	Sony
54-Channel Converter	Jerrold
Comb. Generator	Tektronix
Field Strength Meter	Texscan
Volt Ohm Meter	Simpson
Coaxial Switches	Texscan
Simultaneous Sweep	Avantek
Attenuators	RMS-Texscan

* * *

[MATERIAL DELETED]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Technical and Operational Requirements of Part 76, Cable Television	)	MM Docket No. 85-38

REPLY COMMENTS

The undersigned cable television operators hereby reply to the Comments of various municipal and state interests filed in this proceeding.

* * *

Respectfully submitted,

HARRON COMMUNICATIONS CORP.
TELECABLE CORPORATION
TRIBUNE CABLE
COMMMUNICATIONS, INC

[EXHIBIT]

COMMENTS ON APPENDIX A,
ATLANTIC RESEARCH ENGINEERING STATEMENT

by
Nicholas E. Worth
Vice President, Engineering
TeleCable Corporation

On Page 2 of Appendix A of its Engineering Statement, Atlantic Research states that,

> "2. A well designed and properly operated and maintained cable system can achieve a C/N of 46 dB a CTB of -55 dB (for non-coherent carriers) for most of the subscribers."

On Page 5, they state that "cities need and want realistic standards in the cable franchises they grant to cable systems."

Computations:

As the following analysis will show, requiring, that Class I or other channels be delivered to subscriber television terminals at a minimum carrier to noise ratio of 46 dB is unrealistic, and would severely restrict and diminish service.

The decibel ratio of signal to noise at the output of an amplifier, herterodyne signal processor or converter may be computed as follows:

$$S_0 - N_0 = S_i - N_i - F^{1/}$$

Where $S_0 - N_0$ = decibel ratio of signal output to noise output

$S_i - N_i$ = decibel ratio of signal input to noise input

F = noise figure of device, dB

In a CATV system with a constant 75 ohm impedance, noise at 68° F, within a 4 MHz bandwidth is as follows:

$$N_i = -59 \text{ dBmV}^{2/}$$

And,

$$S_0 - N_0 = S_i + 59 \text{ dBmV} - F$$

1/ Information Transmission, Modulation and Noise, Swartz, McGraw-Hill, 1959, p. 227.

2/ Technical Handbook for CATV Systems, Simons, General Instrument Corp., 3rd Edition, pp. 13, 14.

Received carriers of UHF broadcast stations near the fringes of grade B contours can, with proper receiving equipment, be input to headend signal processors with levels of $\geq$ 0 dBmV. For a Scientific Atlanta Model 6150 heterodyne signal processor, noise figure at UHF frequencies is 9 dB. NCTA Signal to noise ratio of the headend component may be found as follows:

$$S_0 - N_0, \text{ headend} = S_i + 59 \text{ dBmV} - F$$

$$= 0 + 59 \text{ dBmV} - 9 \text{ dB}$$

$$S_0 - N_0, \text{ headend} = 50 \text{ dB}$$

In a CATV distribution plant, amplifiers must be cascaded to serve an entire community. Many mature systems use trunk cascades as long as 32 amplifiers, followed by a bridger amplifier module and two feeder line extender amplifiers. For

a cascade of identical amplifiers,

Simons[3/] has shown that:

$F_{cascade} = F_{single\ amplifier} + 10\ Log\ n$

Where n = number of amplifiers in cascade

Using input levels typical of good design and the published noise figures of Magnavox MX-504 series amplifiers, representative of the state of the art in CATV distribution systems, NCTA signal to noise ratio for a cascade of 32 trunks, one bridger module and two line extender amplifiers can be computed as follows:

$S_0 - N_0$, trunk = S_i + 59 dBmV - F - $10\ Log\ n$

Where, S_i = 10 dBmV - 1.5 dB (equalizer loss)
F = 9 dB
n = 32

$S_0 - N_0$, trunk = 8.5 dBmV + 59 dBmV - 9 dB - 15.1 db = 43.4 dB

3/ Op. cit.

$S_0 - N_0$, bridger = S_i + 59 dBmV - F

Where, S_i = 16.5 dBmV
F = 9.5 dB

$S_0 - N_0$ bridger = 16.5 dBmV + 59 dBmV - 9.5 dB = 66 dB

$S_0 - N_0$, line extenders = S_i + 59 dBmV - F - $10\ Log\ 2$

Where, S_i = 18 dBmV - 1.5 dB (equalizer loss)
F = 10 dB

$S_0 - N_0$, line extenders = 16.5 dBmV + 59 dBmV - 10 db - 3 db = 62.5 dB

The final link in the CATV delivery system is the television set top converter. The General Instrument Corporation Model DRZ series is representative of the state of the art in set top devices.

Noise figure, F, is specified as 13 dB, maximum. Minimum levels at the output of a subscriber tap at the highest operating system frequency are typically + 0 dBmV. For an average drop length of 125'

of RG59 at 400 MHz, drop loss is ≃6.5dB. Assuming that one two-way splitter has been installed for a VCR or additional output, input to the converter is≃10 dBmv - 6.5 dB - 3.5 dB = 0 dBmV. Although higher tap levels are typical, so are additional outlet and longer drops. 0 dBmV must be used as the "worst case" converter input.

$S_0 - N_0$, converter = 0 dBmV + 59 dBmV - 13 dBmV = 46 dBmV

The signal to noise ratio of the combined elements may be computed as follows:[4/]

$$\sum S_0 - N_0 = -10 \text{ Log}\left(\sum_{i=1}^{n} 10^{\frac{-Si/Ni}{10}}\right)$$

= NCTA decibel signal to noise ratio, entire system

$$\sum S_0 - N_0 = -10 \text{ Log}\left(10^{-50/10} + 10^{-43.4/10} + 10^{-66/10} + 10^{-62.5/10} + 10^{-46/10}\right)$$

4/ CATV system C/N Analysis, Mauney, CED Magazine, March 1985, p.14.

$$\sum S_0 - N_0 = -10 \text{ Log}(8.16 \times 10^{-5})$$
$$= 40.9 \text{ dB}$$

Strauss has shown that NCTA S/N can be related to CCIR S/N by the following formula.[5/]

$$S/N_{CCIR} = S/N_{NCTA} - 0/.2 \text{ dB}$$

$$\sum S/N_{CCIR} = 40.9 \text{ dB} - 0.2 \text{ dB}$$
$$= 40.7 \text{ dB}$$

5/ The Relationship Between the NCTA, EIA and CCIR Definitions of Signal to Noise Ratio, T.M. Strauss, 23rd Annual NCTA Convention Technical Transcript, p. 58.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JAN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, AND NATIONAL LEAGUE OF CITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 25, 1988

QUESTIONS PRESENTED

By a vote of 2-1 the Court of Appeals upheld an FCC order preempting local and state cable television technical standards which are "more stringent" than FCC "guidelines"—even though the Court of Appeals was unable to find a clear manifestation of Congressional intent in the Cable Communications Policy Act of 1984 to authorize such preemption and even though it concluded that the relevant Congressional language is susceptible of a construction which avoids preemption. The questions presented are whether the Court of Appeals applied an erroneous legal standard for preemption analysis and whether it misconstrued the Cable Act.*

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*The listing of parties required by Rule 34.1(b) is set forth on page ii of the Petition for Writ of Certiorari.

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S. 66, 98th Cong., 1st Sess., *reprinted in*, 129 Cong. Rec. S8,237 (daily ed. June 14, 1983) 13,22

No. 87-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, AND NATIONAL LEAGUE OF CITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Federal Communications Commission ("FCC" or "Commission") Report and Order under review is published at 50 Fed. Reg. 52,462 (December 24, 1985), and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Petition") at page 49.

The opinion of the United States Court of Appeals for the District of Columbia Circuit upholding, in part, the Commission's Report and Order is reported at 814 F.2d 720 and is reprinted in the Appendix to the Petition at page 4.

The orders of the Court of Appeals denying rehearing and rehearing en banc are reprinted in the Appendix to the Petition at page 1 and page 2 respectively.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1987. The orders denying rehearing and rehearing en banc were entered May 27, 1987. The Petition was timely filed on August 25, 1987, and was granted on November 30, 1987. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) ("Cable Act"), is codified at 47 U.S.C. § 521 *et seq.* (Supp. III 1985). Relevant portions of the Cable Act are reprinted in the Appendix to the Petition at page 96.

STATEMENT OF THE CASE

This case concerns the scope of the FCC's authority, under the Cable Act of 1984, to preempt local and state regulation of cable television technical standards. In order to perpetuate a marketplace philosophy which it had originally adopted prior to the Cable Act, the Commission has prohibited franchising authorities from establishing any technical standards which are *more stringent* than its admittedly incomplete, sixteen-year-old "guidelines." Petitioners' position is that the Cable Act does not authorize the Commission to issue such a broad and sweeping preemption order; the FCC may preempt only those standards which actually *conflict* with particular standards established by the FCC.

1. The Cable Act

In the mid-1970's the FCC began to restrict local and state regulation of cable television. Wedded to a hands-off "marketplace" approach to cable regulation, the Commission eliminated virtually all of its own cable regulations and preempted local and state authority in a number of areas. The Commission's actions were taken pursuant to its general authority under the original Communications Act of 1934, 47 U.S.C. § 151 et seq. (1982), which was enacted well before the advent of cable television.

Concerns over the erosion of their authority to regulate cable television and to enforce negotiated franchise provisions ultimately led local governments to support passage of the Cable

Act.[1] The Act is based upon a compromise agreement which was negotiated over a two-year period among representatives of local governmental interests and the cable industry. It represents Congress' seminal effort to specify the ground rules under which federal, state and local authorities may regulate cable television.

In "firmly establish[ing] the authority at each level of government," *see* H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984) ("Committee Report"),[2] Congress was called upon to balance a number of different and often conflicting considerations with regard to a wide range of issues. *See* Cable Act § 601, 47 U.S.C. § 521. Congress adopted a policy which "continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." Committee Report at 19. As Congress recognized, "city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." *Id.* at 24. Congress granted local governments "substantial authority to enforce franchise agreements," *id.* at 20, and specifically preempted only those local and state

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1. In part, Congress responded to Chief Justice Burger's invitation in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (concurring opinion), that: "The almost explosive development of [cable television] suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts." *See* 130 Cong. Rec. H10,444 (daily ed. Oct. 1, 1984) (Statement of Representative Markey urging passage of the Cable Act) ("[I]f the House fails to pass a federal cable policy, then our cities will be robbed of their control over cable TV. . . . The cities and the consumer are not included in the Supreme Court-FCC view of cable policy . . . . We must not abdicate our responsibility and turn cable regulation over to the FCC and the Supreme Court. Instead, we should be bold in our stance in support of the cities and the consumers").

2. The Committee Report was drafted by the House Committee on Energy and Commerce. The Committee Report and certain floor statements were specifically adopted by both the Senate and the House as their explanation of the Act. *See* 130 Cong. Rec. S14,285 (daily ed. Oct. 11, 1984) (statement of Senator Packwood); 130 Cong. Rec. H12,235 (daily ed. Oct. 11, 1984) (statement of Representative Wirth).

initiatives which are "inconsistent with this Act." Cable Act § 636(c), 47 U.S.C. § 556(c).[3]

One of the issues which Congress addressed directly in the Cable Act relates to regulation of the signal quality provided by cable systems. This was (and remains) an issue of significant concern to franchising authorities. Indeed, of the millions of cable subscriber complaints made each year to franchising authorities, the most common complaint involves unacceptably poor picture and sound quality.

Congress responded to these concerns by vesting local and state governments with broad authority "relating" to the cable "facilities and equipment" which necessarily determine signal quality. Cable Act §§ 624(a)-(c), 47 U.S.C. §§ 544(a)-(c); Committee Report at 68. In Section 624(e) of the Cable Act, 47 U.S.C. § 544(e), Congress authorized the FCC to "establish technical standards relating to [such] facilities and equipment . . . ." But Congress made clear, in the Committee Report at 70, that:

> This provision [Section 624(e)] does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to Section 624(b) which are *not inconsistent with standards established by the FCC under this subsection.* (Emphasis added).

Congress gave cable operators the right, enforceable in federal court, to obtain modification of any facilities and equipment requirement which is "commercially impracticable." Cable Act §§ 625(a)-(b), 47 U.S.C. §§ 545(a)-(b).

Congress also set forth in the Cable Act the procedures which a franchising authority must follow, and the criteria which it may consider, in determining whether to renew a cable franchise. These criteria include the cable operator's "signal quality" and "response to consumer complaints," the majority of which (as

3. "Rather than simply preempting all existing regulation, as it could have done, Congress chose to create a finely-tuned system coordinating federal, state and local authority and also to preserve those provisions of existing franchises that were not inconsistent with the Cable Act." *Housatonic Cable Vision Co. v. Department of Public Utility Control*, 622 F. Supp. 798, 812 (D. Conn. 1985).

noted above) involve signal quality. Cable Act 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B). A franchising authority is subject to a civil action in federal court if it fails to comply with the Act's renewal procedures or if its rulings on the signal quality and other relevant renewal issues are not supported by a "preponderance" of record evidence. Cable Act § 626(e), 47 U.S.C. § 546(e).

2. Pre-Act FCC Technical Standards

Cable systems have the capacity to provide their subscribers with a multitude of television channels, which offer video programming and non-video communications services. Since 1972, the Commission has broken cable channels into four categories:

> "Class I Cable Channels," which are devoted to the delivery of conventional over-the-air television broadcast stations.
>
> "Class II Cable Channels," which are devoted to the delivery of unscrambled non-broadcast television services (e.g., satellite-delivered programming services such as Cable News Network, ESPN and access channels).
>
> "Class III Cable Channels," which are devoted to the delivery of non-broadcast television services that may be received only with the use of a decoding device (e.g., pay cable movie services such as Home Box Office; FM or AM radio stations).
>
> "Class IV Cable Channels," which provide two-way interactive services.

See 47 C.F.R. §§ 76.5(t)-(w) (1986); *Cable Television Report and Order*, 36 F.C.C.2d 143, 198-99 (1972).

When the Commission first adopted cable technical standards in 1972, cable systems did little more than provide improved reception of conventional broadcast television signals. Consequently, the Commission's standards were made applicable only to Class I channels. Modern cable systems, however, typically provide a number of services in addition to the retransmission of conventional television stations. In fact, the majority of cable services offered by many contemporary systems consists of non-Class I channels. Nevertheless, the Commission's technical rules

have remained applicable only to Class I channels and have not been updated since 1972 to include any standards for signal quality on Class II, III and IV channels. *See* Atlantic Research Corporation Engineering Statement in FCC Docket MM 85-38 ("ARC Engineering Statement") (J.A. 31-32).[4]

Even with regard to Class I channels, the Commission has failed to address a number of important parameters which affect the technical quality of the picture received by cable subscribers. The Commission has adopted only four technical guidelines which directly affect signal quality of Class I channels. *See* ARC Engineering Statement (J.A. 28-29), *citing* 47 C.F.R. §§ 76.605(a)(7)-(10). A cable system which meets or exceeds these four guidelines may nevertheless provide an unacceptable picture on Class I channels if its performance, as tested by parameters for which the FCC has failed to set standards, is inadequate. *See generally* ARC Engineering Statement (J.A. 28). The missing parameters, some twenty in number, were identified in engineering statements submitted to the Commission below.[5]

Until the proceedings below, the Commission itself had consistently recognized that its technical standards are "incomplete," a "first step" which required revision to accommodate technological

4. Numbers in parentheses preceded by "J.A." refer to pages in the Joint Appendix. Numbers in parentheses preceded by "App." refer to pages in the Appendix to the Petition.

5. The FCC has established no standards for many signal quality parameters which affect a number of picture problems, including: changing hues (e.g., faces become green); vertical rolling of picture; horizontal tearing of picture; picture noise; unclear images; total or partial disappearance of color; appearance of large bars in the picture; and various combinations of horizontal and vertical interference. ARC Engineering Statement (J.A. 32-35). The missing standards include the following: differential phase, differential gain, luminance non-linear phase distortion, chrominance-to-luminance intermodulation, impulsive noise, random noise, field-time waveform distortion, line-time waveform distortion, short-time waveform distortion, chrominance-luminance gain inequality, chrominance-luminance delay inequality, gain/frequency distortion, synchronizing pulse non-linear distortion, periodic noise, crosstalk, signal amplitude, relative burst gain error, and relative burst phase error. ARC Engineering Statement (J.A. 32-34).

developments.[6] Initially, therefore, in its *Reconsideration of Cable Television Report and Order*, 36 F.C.C.2d 326, 359-60, 364 (1972), the FCC permitted franchising authorities to adopt standards more comprehensive than the federal standards. Less than two years later, however, the Commission preempted local and state technical standards which exceeded its own standards. The Commission did so expressing an intent to adopt, in a future proceeding, nationwide standards which would be "more complete and refined than our present standards." *Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 477-78 (1974); *see also Report and Order in Docket No. 20765*, 64 F.C.C.2d 743, 750 (1977) (FCC staff engaged in "general review" of technical standards and suggested revisions will be addressed "in a future proceeding.") The promised proceeding was never initiated.

3. Post-Act FCC Technical Guidelines

On February 12, 1985 the Commission issued a *Notice of Proposed Rulemaking in MM Docket No. 85-38*, 50 Fed. Reg. 7,801 (1985) ("NPRM"), stating that it was "appropriate to reexamine and update the [cable technical] rules at this time." NPRM ¶ 1 (J.A. 4). The Commission acknowledged that these rules had become outdated as a result of industry changes. *Id.* ¶ 5 (J.A. 7-8). But rather than "update" its cable technical rules, the Commission proposed their deletion. According to the Commission, cable operators "are capable of transporting products at quality levels far exceeding those specified in [the Commission's] Rules." *Id.* ¶ 7 (J.A. 9). The Commission also noted that the cable industry had developed its own set of voluntary signal quality standards which "in general exceed" the FCC rules. NPRM ¶ 8 (J.A. 9-10). Believing that the marketplace would

6. *See Notice of Proposed Rulemaking in Docket No. 18894*, 25 F.C.C.2d 38, 42 (1970); *Cable Television Report and Order*, 36 F.C.C.2d 143, 198, 204 (1972); *Reconsideration of Cable Television Report and Order*, 36 F.C.C.2d 326, 359-60, 364 (1972); *Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 477-78 (1974); *Notice of Proposed Rulemaking in Docket No. 20765*, 58 F.C.C.2d 1035, 1035 (1976); *Report and Order in Docket No. 20765*, 64 F.C.C.2d 743, 750 (1977).

ensure adequate signal quality, the Commission saw no "need" for cable technical rules. *Id.* ¶ 9 (J.A. 11).

The Commission was concerned that franchising authorities might fill the regulatory void by imposing "overly burdensome" technical requirements and that this would have an "adverse impact on the growth of cable television." NPRM ¶ 10 (J.A. 12-13). The Commission thus proposed to publish its technical rules as "guidelines" in an Office of Science and Technology ("OST") bulletin, and to prohibit franchising authorities from adopting any technical requirements which "go beyond" those guidelines. *Id.* (J.A. 12-14). The Commission concluded, based upon a two-sentence "analysis," that it has the power under the newly enacted Cable Act to maintain such a preemption policy. *Id.* (J.A. 13).

Franchising authorities and other parties opposed the Commission's preemption policy as overly broad and contrary to the Cable Act. They explained the need for a complete set of objective technical standards, and submitted engineering statements and other information establishing that the FCC technical rules fail to meet this need. *See, e.g.,* ARC Engineering Statement (J.A. 28). Franchising authorities also took the position that, at a minimum, the Commission should comprehensively review and update its antiquated technical rules, rather than delete them, to ensure that they define an acceptable level of signal quality for modern cable operations.

Certain cable interests and other parties filed comments generally supporting the Commission. They did not seek to rebut the franchising authorities' claims concerning the inadequacy of the FCC's technical standards. Instead, they agreed with the Commission that cable operators are capable of providing a service superior to that required by these rules and that the marketplace would ensure such a service. They also expressed their concern that, absent preemption, some franchising authorities might require cable operators to provide an unreasonably high quality signal.

In its *Report and Order in MM Docket No. 85-38*, 50 Fed. Reg. 52,462 (December 24, 1985) ("Report and Order"), adopted October 31, 1985, the Commission reaffirmed its view that the marketplace, and not government authorities, should determine signal quality standards. Accordingly, the Commission announced that it would no longer enforce, or require compliance with, any of its cable technical rules. Report and Order ¶¶ 6-10 (App. 58-66). Rather than following its proposal to delete these rules and place them in an OST bulletin as "guidelines," the Commission relabeled them as "standards"—a distinction which the Commission did not explain. The Commission concluded that any local or state standards which exceed its "standards," including any and all standards for Class II, III and IV channels, are preempted as "inconsistent" with "our national policy" of marketplace regulation. *Id.* ¶ 17. (App. 72-74). The Commission's new regulation, published at 47 C.F.R. § 76.605 (1986), includes the following "note":

> NOTE.—The requirements of Sections 76.605(a)(1) through 76.605(a)(10) do not apply directly to cable systems. These rule sections or less stringent versions of them may be used as standards by state or local regulatory authorities. No technical parameter in excess of the above rule sections may be required.

The Commission was unable to find anything in the Cable Act affecting its pre-Act preemption policy with regard to technical standards; thus, it relied upon pre-Act judicial decisions affirming its authority to use "a clearly articulated policy of deregulation" as a "clear basis for federal preemption." *Id.* ¶ 17 n.14, ¶ 18 (App. 74-75). The Commission refused to review its former technical rules to ensure that they provide for an acceptable level of signal quality. The Commission said that the marketplace would ensure adequacy and that, in any event, this proceeding was not the appropriate one to consider revisions to its technical rules. Report and Order ¶ 2 n.2 (App. 54). Nevertheless, the Commission relaxed certain technical requirements which do not relate to signal quality. *Id.* ¶¶ 20-21 (App. 76-78).

4. Court of Appeals Decision

By a 2-1 vote the Court of Appeals upheld the Report and Order insofar as it preempts Class I standards that differ from the FCC's. The majority (Silberman, J. and R. Ginsburg, J.) recognized that, under the Cable Act, franchising authorities may adopt technical standards which are "not inconsistent" with the FCC's standards. Maj. op. at 10 (App. 22). However, it found this term to be "imprecise" and "ambiguous," explaining that the "words 'not inconsistent' are susceptible" to the interpretations urged by both the FCC and by franchising authorities. *Id.* at 11, 10 (App. 24, 23). The majority considered the FCC interpretation to be the "more persuasive" because neither the language nor the legislative history of the Cable Act reflects any specific criticism of the FCC's pre-Act policy on preempting technical standards. *Id.* at 9, 11-12 (App. 20, 25-26).

Judge Mikva dissented from the majority ruling on Class I standards, concluding that the FCC's preemption policy exceeds the Commission's authority under the Cable Act. He found that "the majority commits a serious error, and departs from established doctrine, in sanctioning preemption in the absence of a clear congressional mandate." Dis. op. at 1 (App. 36-37). Judge Mikva also found that the majority had acceded to an FCC interpretation which is "at odds" with the commonly accepted meaning of the critical Congressional language; which is "at odds with common sense"; and which "flatly contradicts the relevant legislative history." *Id.* at 4, 6 (App. 45-48).

The panel reached a different, and unanimous, result with respect to Class II, III and IV channels, for which the Commission has not established any technical standards. It agreed that franchising authorities need a set of objective technical standards in order to fulfill their responsibilities under Section 626 of the Cable Act, 47 U.S.C. § 546, which sets forth procedures and criteria for renewing cable franchises. Because the Commission had acted arbitrarily and capriciously by failing to consider the impact of Section 626, the Court of Appeals vacated and remanded the Report and Order insofar as it preempts Class II, III and IV standards. Maj. op. at 12-16 (App. 27-35); Dis. op. at 1 (App. 35-36).

The FCC has not yet conducted any proceedings on remand. It appears, however, that the FCC may satisfy the remand order by refusing to establish any technical standards for Class II, III and IV channels (if it can explain away Section 626), or by simply extending without change the inadequate Class I standards to Class II, III and IV channels. *See* Maj. op. at 12 (App. 26-27) (FCC may decide that "a certain level of regulation is *all* that is desirable" and is not required to update its technical standards, however, "minimal" they may be) (emphasis in original).

SUMMARY OF ARGUMENT

There is no question that the Cable Act authorizes the FCC to establish cable technical standards and to exercise *certain* preemption authority with regard to such standards. But the Commission's authority to issue standards is not exclusive, and its authority to preempt is not boundless. That authority is subject to specific limitations imposed by Congress in the Cable Act. Congress made clear that the Commission may not override the right of franchising authorities to promulgate and to enforce technical standards which are "not inconsistent" with the particular standards established by the Commission.

The FCC, however, has refused to abide by this limitation and to accept the Cable Act as a supervening event which does indeed circumscribe its discretion to displace local and state cable regulation. The FCC's view is that the Cable Act has changed nothing in the area of technical standards; it is as free today as it was before the Cable Act to strike down any and all technical standards in order to promote its deregulatory agenda. The Commission has adopted the overly broad notion that Congress, by authorizing franchising authorities to establish standards "not inconsistent" with FCC "standards," preempted any standard which is more stringent than the FCC's incomplete and outdated

technical "guidelines"—wholly without regard to whether there is any actual *conflict* between the two.

In upholding the Commission, the majority below adopted a preemption analysis which conflicts with established principles underlying our federalist system of government. Under settled judicial doctrine, preemption is inappropriate where Congress has not manifested a clear intent to preempt or where the relevant statute may reasonably be construed to avoid preemption. The majority below, however, determined that local and state governmental authority may be displaced even where, in its judgment, the relevant statutory language and legislative history are "ambiguous," "imprecise" and "susceptible" of a construction which avoids preemption.

The error is compounded by the fact that the majority below acquiesced in an FCC interpretation of the Cable Act which contravenes clear Congressional intent. The majority (like the FCC) construed the pertinent Congressional language ("inconsistent") without even considering Congress' definition of the very same language in other provisions of the Cable Act. In the process, the majority sanctioned a construction which is directly contrary to those other provisions, and which deprives franchising authorities of that set of standards necessary to rule upon the signal quality criterion of Section 626 of the Cable Act.

Indeed, the effect of the ruling below is that franchising authorities may not play any role in establishing meaningful technical standards. Dis. op. at 4-5 (App. 45-46). At the same time, the FCC has not been required to establish such standards as a basis for preemption. The absurdity of it all is that, so long as the FCC has at least one technical "guideline" (however inadequate and meaningless), franchising authorities may be prohibited from doing anything other than enforcing compliance with that solitary guideline. Congress did not intend such a result.

ARGUMENT

TO SUSTAIN THE FCC'S ORDER, A REVIEWING COURT MUST FIND CLEAR AND UNMISTAKABLE EVIDENCE OF CONGRESSIONAL INTENT TO AUTHORIZE PREEMPTION OF ALL LOCAL REGULATION OF CABLE SIGNAL QUALITY. CONGRESS CLEARLY ARTICULATED A DIFFERENT PLAN—PROVIDING FOR BOTH FEDERAL AND LOCAL REGULATION, AND LIMITING PREEMPTION TO INSTANCES WHERE LOCAL REGULATION ACTUALLY CONFLICTS WITH TECHNICAL STANDARDS ESTABLISHED BY THE FCC.

The "critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n* v. *FCC*, 106 S.Ct. 1890, 1899 (1986). A federal agency may, of course, issue regulations which preempt local initiatives. *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982). But it may do so "only when and if it is acting within the scope of its congressionally delegated authority." *Louisiana Public Service Comm'n* v. *FCC*, *supra*, 106 S.Ct. at 1901; *see Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, *supra*, 458 U.S. at 153-54 (agency preemption actions are reviewed to determine whether the agency "exceeded [its] statutory authority").

The FCC's authority with respect to cable television is confined by the four corners of the Cable Act.[7] And the Cable Act adopts,

7. In its brief below the FCC argued that it continues to derive preemption authority over cable from generalized provisions of the Communications Act of 1934. This argument reflects a fundamental misunderstanding of the very purpose of the Cable Act. *See* pages 2-4 *supra* and pages 22-25 *infra*. Moreover, it is squarely foreclosed by the express language and legislative history of the Cable Act.

The Senate initially passed a bill which would have given the Commission jurisdiction over cable "in accordance with the provisions of [that bill] *and other applicable provisions of law*." *See* S. 66, 98th Cong., 1st Sess. § 604(1), *reprinted in*, 129 Cong. Rec. 58,237 (daily ed. June 14, 1983) (emphasis added). But this bill, because of the opposition of local and state governments, did not become law. Instead, when Congress passed the Cable Act, it amended Section 2(a) of the 1934 Communications Act—the provision upon which the Commission sought to rely for preemption authority—to leave no doubt that the Commission's authority over "cable services" must be found in the Cable Act and not in the 1934 law.

as the only proper basis for preemption, a test of "inconsistency." The decision of the majority below to uphold the FCC's conclusory and result-oriented interpretation of that term reflects a disregard of both proper preemption analysis and clear Congressional intent.

I.

THE COURT OF APPEALS APPLIED AN ERRONEOUS LEGAL STANDARD FOR PREEMPTION ANALYSIS

Respect for the separate spheres of governmental authority has produced certain well-settled principles of preemption analysis—principles designed to ensure that the judgments of local and state authorities are not lightly displaced by the federal government.

Preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981); *see Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). That "basic assumption" can be overcome only by a clear manifestation of Congressional intent to preempt. As this Court noted in *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981):

> Pre-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, *or that the Congress has unmistakably so ordained.*"

Section 2(a) of the Communications Act of 1934 is amended by adding at the end thereof the following: "*The provisions of this Act [i.e., the Communications Act] shall apply with respect to cable service*, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, *as provided in Title VI [i.e., the Cable Act]*." (Emphasis added).

Pub. L. No. 98-549, § 3(a)(1), 47 U.S.C. § 152(a).

Id. at 317, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (emphasis added); *accord Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 634 (1981).[8] Likewise, the Court has concluded that federal and local enactments should be accommodated if at all possible. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973):

> [W]e may not overlook the body of law relating to the sensitive inter-relationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. . . . *[T]he proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."*

Id. at 127, quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963) (emphasis added).[9]

The majority below adopted an entirely different—and improper—approach to preemption analysis. It did not discern a "clear" or "unmistakable" Congressional intent to preempt technical standards which merely differ from the FCC's; in fact, the majority's analysis led it to conclude that the legislative record is "ambiguous" and "imprecise." Maj. op. at 11 (App. 23); Dis.

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8. "Proper respect, therefore, for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid preemption, absent an unmistakable indication to the contrary." *Penn Terra Ltd.* v. *Department of Environmental Resources*, 733 F.2d 267, 273 (3d Cir. 1984)

9. The importance of the considerations underlying the above principles of preemption analysis was recently underscored by the Administration in its Executive Order 12612, 52 Fed. Reg. 41,685 (Oct. 30, 1987). There, the President stated that: "In the absence of *clear* constitutional or statutory authority, the presumption of sovereignty should rest with the individual States." *Id.* at 41,686 (emphasis added). Accordingly, the President instructed all executive departments and agencies to preempt

> only when the statute expressly authorizes issuance of preemptive regulations or where there is some other *firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting state laws.*

Id. at 41,687 (emphasis added).

op. at 2 (App. 39).[10] The majority found that the critical Congressional language ("not inconsistent") was "susceptible" of an interpretation which avoids preemption, Maj. op. at 10-11 (App. 23); yet it adopted an interpretation which sanctions preemption. Indeed, the majority "strained" to find a preemptive intent, Dis. op. at 5 (App. 46), summarily dismissing the dissent's discussion of relevant legislative history with no more than a "but see" citation, Maj. op. at 11-12 (App. 25), and failing to consider other relevant Congressional language. *See* pages 18-20 *infra*.

II.

THE COURT OF APPEALS ACCEDED TO AN FCC INTERPRETATION OF THE CABLE ACT WHICH CONTRAVENES CLEAR CONGRESSIONAL INTENT

On the basis of the majority's own assessment of the legislative record, settled doctrine would require reversal of the Commission's overly broad preemption order. But this conclusion also follows from an examination of the Cable Act and its legislative history. Congress unambiguously intended to preempt only those technical standards which conflict with "standards"—not marketplace "policy"—established by the FCC.

A. Congress Never Intended to Permit Preemption of Local and State Technical Standards Simply Because They Are More Stringent Than Federal Standards

Congress concluded that the ability of a franchising authority to require particular cable "facilities and equipment" is "essential if cable systems are to be tailored to the needs of each community." Committee Report at 26. Accordingly, in Sections

10. In *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), the proponents of preemption relied upon legislative history which the Supreme Court considered "ambiguous" "at best." *Id.* at 416. The Court concluded that: "Far more would be required to show the 'clear manifestation of [Congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action." *Id.* at 417, quoting *Schwartz* v. *Texas*, 344 U.S. 199, 202-03 (1952).

624(b) and (c) of the Act, 47 U.S.C. §§ 544(b) and (c), Congress authorized franchising authorities to adopt and to enforce "requirements for facilities and equipment." The term "facilities and equipment" in Section 624 was intended to be read broadly:

> Facility and equipment requirements *may include requirements which relate* to channel capacity; system configuration and capacity, including institutional and subscriber networks; headends and hubs; two-way capability; addressability; trunk and feeder cable; and *any other facility or equipment requirement, which is related to the establishment and operation of a cable system*, including microwave facilities, antennae, satellite earth stations, uplinks, studios and production facilities, vans and cameras for PEG use.

Committee Report at 68 (emphasis added).[11]

The Commission's only grant of authority regarding signal quality standards comes in Section 624(e), 47 U.S.C. § 544(e), which provides that the "Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." There is absolutely nothing in Section 624(e) itself suggesting that the Commission's authority to establish signal quality standards is exclusive or that it can be used to preempt local standards. To the contrary, Congress was quite explicit in stating that Section 624(b) of the Act, 47 U.S.C. § 544(b), is the source of local and state authority to establish technical standards and further, that such authority is to be preempted *only* in those instances where local technical standards are "inconsistent" with technical standards established by the Commission:

> This provision [Section 624(e)] does not affect the authority of a franchising authority to establish standards

11. As the above passage of the Committee Report demonstrates, the term "facilities and equipment" encompasses a wide array of matters which affect the technical quality of the various signals provided by a cable operator. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983) (noting the broad scope of the term "relate").

> regarding facilities and equipment in the franchise pursuant to Section 624(b) *which are not inconsistent with standards established by the FCC under this subsection.*

Committee Report at 70 (emphasis added). *See also* Cable Act § 636, 47 U.S.C. § 556 (preempting local initiatives "inconsistent" with the Act).

Both the Commission and the majority below equated the term "inconsistent" with "more stringent." But this definition is contrary to the commonly understood meaning of that term and with "common sense." Dis. op. at 4-5 (App. 45).[12] It is also contrary to Congress' use of the same term in other provisions of the Cable Act—provisions which were not mentioned by either the Commission in its Report and Order or by the majority below:

> —Section 634 of the Act, 47 U.S.C. § 554, which establishes equal employment opportunity standards for cable systems, provides that "[n]othing in this section shall affect the authority of any State or any franchising authority... to establish or enforce any requirement which is *consistent* with the requirements of this section ...." Cable Act § 634(i), 47 U.S.C. § 554(i) (emphasis added). Congress explained that *consistent* EEO requirements include those which are "more stringent" and provide "higher equal employment opportunity standards than are provided under this title." Committee Report at 93.
>
> —Section 633 of the Act, 47 U.S.C. § 553, specifies certain penalties and sanctions for the unauthorized reception of cable services. Section 633(c)(3)(D), 47 U.S.C. § 553(c)(3)(D), states that "[n]othing in this title shall prevent any State or franchising authority from enacting or enforcing laws, *consistent* with this section, regarding unauthorized interception or reception of any cable service or other communications service." (Emphasis added.) Congress explained that "consistent" laws include those which "impose higher penalties or sanctions than those set forth in this section." Committee Report at 84.
>
> —Section 631 of the Act, 47 U.S.C. § 551, sets forth various provisions intended to ensure the protection of cable subscribers' privacy. Section 631(g), 47 U.S.C. § 551(g) provides that "[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws *consistent* with this section for the protection of subscriber privacy." (Emphasis added.) Congress explained that this provision may subject cable systems to "more stringent privacy laws of state and local governments, so long as these laws are consistent with this section." Committee Report at 78.[13]

As the foregoing makes clear, Congress recognized in other provisions of the Cable Act that a local requirement which is more stringent than a federal requirement may still be "consistent" with that federal requirement. There is nothing in the Act or its legislative history to indicate that Congress intended a different meaning of the term "inconsistent" when applied to technical standards.[14] Indeed, in areas where Congress intended

12. *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law"); *National Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823-24 (1st Cir. 1979) ("The use of the word 'inconsistent' in the [Hazardous Materials Transportation] Act's preemption clause, implies that state laws which merely vary from federal law—as opposed to those which conflict with federal law—are not preempted ....").

13. Congress explicitly stated in Sections 631, 633 and 634 that local authorities could adopt requirements in privacy, theft of service and EEO matters. These specific statements were necessary because the entire structure of those statutory provisions is federal—that is, they establish a detailed federal framework for dealing with specific issues. Absent specific references to the role which local authorities may assume, local authorities might otherwise be precluded from adopting their own laws in these areas.

By contrast, the framework of Section 624 is local. That section focuses upon the various matters which franchising authorities may require. Thus, Congress made specific mention in Section 624(e) of the role of the Commission in setting technical standards; otherwise the Commission would have no authority in this area. The provision was necessary to preserve even a modicum of federal authority.

14. *Fortin* v. *Marshall*, 608 F.2d 525, 528 (1st Cir. 1979) ("There is a presumption that the same words used in different parts of an act have the same meaning"); *Firestone* v. *Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982) ("We

that franchising authorities not go beyond federal standards, Congress included a specific provision to that effect in the Cable Act. E.g., Cable Act § 612(b)(2), 47 U.S.C. § 532(b)(2), which expressly prohibits franchising authorities (and others) from requiring "any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1) . . . ." (emphasis added); Cable Act § 613(d), 47 U.S.C. § 533(d), which bars state and local governments from establishing cross-ownership restrictions.[15]

B. The FCC's Interpretation Conflicts With the Congressional Objectives Underlying the Cable Act's Renewal Provisions

A principal objective of the Cable Act is to "establish an orderly process for franchise renewal." Cable Act § 601(5), 47 U.S.C. § 521(5). To help achieve this objective, Congress specified the procedures to be followed, and the criteria that may be considered, in determining whether to grant renewal. Among

follow the well-known maxim of statutory construction that, when the same terms are used in different sections of a statute, they receive the same meaning"); *Director* v. *Goudy*, 777 F.2d 1122, 1127 (6th Cir. 1985).

15. Congress has been quite explicit in other legislation when it has not wanted local or state authorities to adopt standards which are different than those adopted by a federal agency. *See, e.g.*, Federal Meat Inspection Act § 408, 21 U.S.C. § 678 (1982) (prohibiting state and local jurisdictions from imposing any "[m]arking, labeling, packaging or ingredient requirements in addition to, or different than, those made under" the Act by the Secretary of Agriculture); National Traffic and Motor Vehicle Safety Act of 1966 § 103(d), 15 U.S.C. § 1392(d) (1982) (prohibiting state and local jurisdictions from adopting motor vehicle safety standards which are not "identical" to those adopted by the Secretary of Transportation); Egg Products Inspection Act § 23(b), 21 U.S.C. § 1052(b) (1982) (prohibiting state and local jurisdictions from imposing standards for egg products which are "in addition to or different from the . . . Federal standards"); Federal Insecticide, Fungicide, and Rodenticide Act § 24(b), 7 U.S.C. § 136v(b) (1982) (prohibiting state and local jurisdictions from establishing labeling requirements for pesticides "in addition to or different from" the federal requirements); Energy Policy and Conservation Act §§ 325(b), 327(a), 42 U.S.C. §§ 6295(b), 6297(a) (1982) (prohibiting state energy efficiency standards not "identical" to federal standards and expressly permitting the Secretary of Energy to preempt a state standard where the Secretary has determined not to establish a standard).

other things, the Cable Act requires franchising authorities to take into account whether

> the quality of the operator's service, including *signal quality*, [and] response to consumer complaints . . . has been reasonable in light of community needs. . . .

Cable Act § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (emphasis added); *see also* Committee Report at 74. Prior to the Cable Act, neither Congress nor the Commission had specifically established any requirement concerning the factors to be considered during renewal.

In order to make a meaningful evaluation of a cable operator's signal quality, franchising authorities need a comprehensive set of objective technical standards, which define an acceptable level of service for modern cable operations. Absent such standards, franchising authorities and cable operators alike would be cast into an endless series of subjective disputes over whether the Section 626 renewal criterion of "signal quality" has been satisfied. The courts would also be confronted with substantial difficulties in determining whether a "preponderance" of record evidence supported a franchising authority's findings with respect to signal quality. Cable Act § 626(e), 47 U.S.C. § 546(e).

The Court of Appeals agreed with these very points. Maj. op. at 14 (App. 31-32). Indeed, it vacated the Commission's order preempting Class II, III and IV standards without establishing any federal standards because the Commission had failed to consider the need for standards under Section 626. But the majority, by acquiescing in the Commission's interpretation of the Cable Act, has effectively permitted the FCC to replace a policy of no standards with a policy of standards so incomplete and outdated as to be meaningless. In both cases the result is the same—the Commission's marketplace philosophy lives on and franchising authorities have no set of meaningful standards for purposes of meeting their Section 626 responsibilities.

In enacting Section 626 Congress presumed that the necessary objective standards would be established and that local authorities would have a role in this process.[16] The Commission's interpretation of the Cable Act, as sustained by the majority below, frustrates achievement of the Congressional objectives of bringing greater "stability and certainty" to the franchise renewal process. Committee Report at 22, 25.

C. There Is Nothing in the Language or Legislative History of the Cable Act Which Reflects A Congressional Intent to Codify Preexisting FCC Preemption Rules

According to the Commission and the majority below, this case turns upon the singular fact that Congress, in the Cable Act and its legislative history, never "criticized" the FCC's preexisting rules which preempt technical standards. In fact, Congress never mentioned these rules one way or the other. The majority and the Commission thus presume that Congress must have intended to codify the FCC's policy when it authorized franchising authorities to adopt standards "not inconsistent with standards established by the FCC." *See* Maj. op. at 8-9, 11-12 (App. 18-20); Dis. op. at 5 (App. 47).[17]

16. The Senate version of the cable legislation provided that a local authority could deny renewal if it found, *inter alia*, that "the signal delivered by the cable system within the control of the cable system operator, has not generally met *technical standards as established by the Commission*. . . ." S. 66, 98th Cong., 1st Sess. § 609(a)(4), *reprinted in*, 129 Cong. Rec. S8,327 (daily ed. June 14, 1983) (emphasis added). The renewal provisions were ultimately changed to exclude the limiting reference to standards "established by the Commission" alone. This change reflects Congress' intent that technical standards may be adopted by either the Commission or local franchising authorities or both.

17. The FCC originally determined that franchising authorities could "require more stringent technical standards than those established by the FCC." *Reconsideration of Cable Television Report and Order*, 36 F.C.C.2d 326, 359-60 (1972). The FCC characterized this policy as one which permitted franchising authorities "to promulgate additional technical standards *not inconsistent* with ours." *Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 478 (1974) (emphasis added). The language adopted by Congress to express the scope of its preemptive intent, if anything, was closer to the original 1972

Such a presumption is quite improper in a case involving preemption. As noted *supra* page 14, preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." That assumption cannot be overcome by Congressional silence. The presumption adopted by the majority and the Commission is "even more specious" in a case which arises under the Cable Act. Dis. op. at 5 (App. 47). For the Cable Act was the product of Congressional dissatisfaction with the manner in which the cable industry had been regulated (or not regulated) at all levels of government as well as court decisions concerning such regulation. *See* note 1 *supra*. Congress sought "to replace" this framework with its own comprehensive national policy. As Senator Goldwater, chairman of the Senate subcommittee with responsibility for the Cable Act, explained when he presented the cable bill for a vote in the Senate:

> Comprehensive legislation is needed to *replace* the patchwork of Federal, State, and local regulations and court decisions that have been governing cable. The Communications Act, written over 50 years ago before cable even existed, provides little or no guidance. The result has been an unstable regulatory environment that has been bad for the cable industry, bad for the local and state franchising authorities, and bad for consumers.

130 Cong. Rec. S14,283 (daily ed. Oct. 11, 1984) (emphasis added).[18]

FCC preemption policy than to the one which it adopted in 1974 and reaffirmed in 1985.

18. *See also* Committee Report at 19, 40 (referring to inadequacy of the 1934 Communications Act); 130 Cong. Rec. H12,241 (daily ed. Oct. 11, 1984) (remarks of Rep. Dingell) (noting that support for the Cable Act was premised on the need for a "clear set of ground rules" rather than the "uncertain environment" that existed under the prior law).

All of the Commission's pre-Act cable preemption policies were based upon one "ultimate dividing line": the Commission confined franchising authorities to the "nonoperational aspects of cable franchising" and precluded them from establishing any requirements for such "operational aspects" as "access" channels and various "aspects of franchisee responsibility." *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 861, 863 (1975). Clearly, Congress has not adopted in the Cable Act the FCC's "ultimate dividing line." For it has vested franchising authorities with substantial powers in several "operational"

"Since Congress was constructing from the ground up, it is incongruous to presume it intended to preserve all elements of the previous makeshift approach unless it specifically disclaimed them. If anything, the opposite presumption—that Congress intended to preserve only those prior policies it endorsed—is the more logical one." Dis. op. at 5-6 (App. 47-48). Although not considered by the majority or the Commission below, the FCC itself has recognized that the Cable Act requires changes in several of the FCC's preexisting policies even though such policies were nowhere specifically disapproved by Congress in the language or legislative history of the Cable Act.[19]

The majority below also attached considerable significance to its finding that the Committee Report "noted, without any indication of disapproval" this Court's decision in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).[20] Maj. op. at 8 (App. 18).

areas, including access channels; facilities and equipment; EEO; subscriber privacy; and theft-of-service. *See* Cable Act §§ 611, 624(b)-(c), 631(g), 633(c)(3)(D), 634(i), 47 U.S.C. §§ 531, 544(b)-(c), 551(g), 553(c)(3)(D), 554(i); Committee Report at 74 (franchising authority shall consider during renewal cable operator "service associated with day-to-day operation").

19. *See, e.g., Notice of Proposed Rulemaking in MM Docket No. 84-1296*, ¶ 37, 49 Fed. Reg. 48,765, 48,769 (1984) (in view of Sections 621 and 622 of the Act, FCC proposes to delete its guidelines concerning "franchise standards," even though no mention is made of the guidelines in the Act or the Committee Report); *id.* ¶¶11-15, 49 Fed. Reg. at 48,766-67 (FCC proposes significant amendment to its definition of "cable system" in light of Act, even though Congress did not mention the FCC definition in the Act or the Committee Report); *Report and Order in MM Docket No. 84-1296* ¶ 68, 50 Fed. Reg. 18,637, 18,646 (1985) (modifying Section 214 procedure for cable systems to effectuate purposes of the Act, even though the "Act does not specifically address the issue of Section 214 authority and the certification process").

20. The majority characterized *Crisp* as having "affirmed the FCC's authority to preempt local technical standards." But *Crisp* specifically concerned only the FCC's preemption of signal carriage requirements; the Court simply noted in passing that the FCC had preempted several areas, including cable technical standards. *See* 467 U.S. at 702, 703 n.8.

It is wrong to suggest, as the majority has, that the Court in *Crisp* blessed every FCC cable preemption policy which it noted in passing. Indeed, among the policies noted was the FCC's preemption of local and state access requirements—an area in which the Court had previously held that the FCC has no authority to regulate. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

It is misleading to say that Congress "noted without disapproval" the *Crisp* decision. After stating that the Cable Act does not affect the FCC's jurisdiction over noncable communications services provided by a cable system, the Committee Report simply expressed "no opinion" as to whether court decisions which had construed the FCC's authority over cable television, such as *Crisp*, address the scope of the FCC's jurisdiction over such noncable communications services provided over a cable system. Committee Report at 96. In light of Congress' clear intent to establish its own policies in the Cable Act for "cable services," reliance upon *Crisp* and prior FCC rules to decide cable preemption issues is plainly inappropriate. *See Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099, 1101-02 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 107 S.Ct. 1559 (1987).

D. The FCC's Policy Arguments Cannot Excuse Its Disregard of Congressionally Imposed Limitations on Its Preemption Authority

The Commission below advanced various policy arguments which, in its opinion, warrant the banishment of franchising authorities from all cable technical regulation.[21] But these arguments were also made by the cable interests before Congress. And Congress arrived at its own resolution of the competing policy considerations—a resolution which, unlike the Commission's, contemplates regulation of signal quality standards by franchising authorities and which defines narrowly the circumstances under which such regulation may be displaced by the Commission.

21. In *Louisiana Public Service Comm'n* v. *FCC*, *supra*, this Court rejected comparable attempts by the FCC to justify preemption on the basis of various policy arguments. The Court found that the Commission, in pursuit of its marketplace dogma, had exceeded Congressionally imposed boundaries; accordingly, it refused to "accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy." 106 S. Ct. at 1901.

The Commission sought to justify its sweeping preemption order as necessary to prevent franchising authorities from imposing unreasonable technical standards. Report and Order ¶¶ 12, 16 (App. 67, 69-72); NPRM ¶ 10 (J.A. 12). Congress, however, did not authorize the Commission to issue broad preemption orders to forestall such excesses. Instead, Congress established carefully balanced procedures in Section 625 of the Act, 47 U.S.C. § 545, to provide a remedy for the cable operator in these circumstances.

For the first time under federal law, procedures were established through which a cable operator could obtain modifications of franchise requirements relating to facilities and equipment if it is "commercially impracticable" for the operator to comply with such requirements. Cable Act § 625(a)(1)(A), 47 U.S.C. § 545(a)(1)(A). Congress specifically provided that:

> This standard is meant to cover situations where, for example, particular equipment or facilities required by a franchise has not developed or functioned technologically as anticipated, or is not available . . . .

Committee Report at 71. The commercial impracticability provision, not preemption, is the appropriate means for dealing with any problems arising from unworkable and excessive local or state requirements. *See Housatonic Cable Vision Co.* v. *Department of Public Utility Control*, 622 F. Supp. 798, 801, 812-13 (D. Conn. 1985). Significantly, however, in legislating its own approach, the Commission did not even mention the Act's commercial impracticability provision.[22]

Congress also did not share the Commission's fears about the impact of differing technical standards in the numerous jurisdictions throughout the country. These fears are no different than those that might be asserted with regard to differing requirements for facilities and equipment. Under Section 624(b) of the Cable

22. The majority below summarily dismissed Section 625. *See* Maj. op. at 9 n.4 (App. 19). This section does not, as the majority stated, "leave to the determination of many franchisors what is or is not 'commercially impracticable' . . . ." *Id.* at 9 n.4 (App. 19). Rather, such determinations may be made, at least in the final instance, by federal courts. *See* 47 U.S.C. §545(b).

Act, 47 U.S.C. § 544(b), however, Congress clearly allowed each of the thousands of jurisdictions to require a different set of cable facilities and equipment. Congress consciously chose a policy of localism in this area.[23]

E. The FCC's Result-Oriented Assessment of Its Preemption Authority Is Not Entitled to Any Deference

The FCC, in its brief before the Court of Appeals, did not argue that its interpretation of the Cable Act is entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The majority below stated that it was not necessary to accord the FCC the benefit of *Chevron* deference; nevertheless, it suggested that *Chevron* might apply. Maj. op. at 11 (App. 24). This "suggestion is alarming" and plainly wrong. Dis. op. at 2 (App. 40). As the dissent concluded:

> [T]he question of whether to defer to an agency interpretation of preemptive authority brings into conflict two lines of teaching and the policies that underlie each. My appraisal of the conflict would be that the federalism concerns at the heart of preemption doctrine are far more compelling than the separations-of-power concerns at the heart of *Chevron* jurisprudence.

Dis. op. at 4 (App. 43).

23. Committee Report at 26 (ability of a franchising authority to require particular cable facilities and equipment is "essential if cable systems are to be tailored to the needs of each community"). *See also* Cable Act § 601(2), 47 U.S.C. § 521(2) (an important objective of the Act is the establishment of "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community"); Committee Report at 19 ("[t]he bill establishes franchise procedures and standards to . . . assure that cable systems are responsive to the needs and interests of the local communities they serve"); *id.* at 24 ("the franchise process [should] take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs").

For several additional reasons, the FCC was not entitled to any deference in the circumstances of this case.[24]

First, this is not an instance where Congress has vested a federal agency with exclusive authority to administer a statute. Rather, Congress has given local and state governments substantial rights and responsibilities under the Cable Act. In *Louisiana Public Service Commission, supra*, another case involving Congressional delegation of power to the FCC and state governments, no question of deference was even considered. Dis. op. at 3-4 (App. 41-43). Moreover, the Cable Act is based upon a compromise agreement among franchising authorities and the cable industry—an agreement which was not formulated with the Commission's participation.[25] The FCC has no special expertise in interpreting the terms of the legislation which was the product of the agreement.

Second, the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). As discussed above, Congress expressed its intent with regard to preemption of technical standards in unmistakable terms. It did not give the Commission the type of unfettered discretion which the Commission has asserted. Congress determined that the FCC may not prohibit local and state governments from enforcing any technical standards other than those which are "inconsistent with standards established by the FCC." Committee Report at 70.

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24. This case does not involve a situation where the FCC has determined that a specific local standard conflicts with a federal standard. The issue here is whether the preemption test which Congress adopted in the Cable Act for technical standards ("inconsistency") is different than the test which it adopted in that Act for other regulatory areas. As the Court's decision in *INS* v. *Cardoza-Foresca*, 107 S.Ct. 1207, 1220-22 (1987) makes clear, this is not the type of issue on which the agency's judgment warrants deference. In any event, determination of the correct judicial standard for ascertaining whether an agency has been delegated preemption power—and whether that standard has been met—is always a question for the courts.

25. *See* 130 Cong. Rec. H10,435, H10,440, H10,442 (daily ed. Oct. 1, 1984); 130 Cong. Rec. S. 14,283 (daily ed. Oct. 11, 1984).

The effect of the Commission's order below, however, is to replace Congress' reference to technical "standards" with the word "policy." Indeed, in the order below at ¶ 17 (App. 72-74), the Commission mistakenly asserted that: "Congress specifically prohibited local governments from enforcing technical regulations that are inconsistent with Federal *policy*." (Emphasis added). The Commission also has effectively eliminated the term "established" from Congress' choice of language. The Commission's position is that it may preempt local and state standards without "establishing" its own competing standards. Furthermore, the Commission has adopted a meaning of the term "inconsistent" which is different than the plain meaning of that term and different than the meaning which Congress itself gave to the same term in other provisions of the Cable Act.

Third, to the extent that the Commission took into consideration the Cable Act, it did so in a careless and highly superficial manner which was apparently designed only to affirm its predetermined course of policy. There is in fact very little discussion—let alone thoughtful discussion—of the Cable Act either in the initial notice of proposed rulemaking or in the final Report and Order. What discussion exists is conclusory in nature. The Commission's initial notice and final order are devoted instead to an elaboration of its policy arguments.

Certainly a relevant consideration would have been to determine what Congress meant by the term "inconsistent." Not once, however, did the Commission ever look to how this term is used by Congress in other provisions of the Cable Act. Likewise, there is no mention whatsoever of various provisions of the Act and its legislative history which were called to the Commission's attention by franchising authorities and which demonstrate that the Commission's expansive preemption policy exceeded its authority. *See* Maj. op. at 12-16 (App. 27-35). The Commission, in its haste to continue its pre-Act course, proceeded myopically without giving any consideration to numerous relevant provisions of the Cable Act and its legislative history. *See SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978) ("'[O]ne factor to be

considered in giving weight to an administrative ruling is the thoroughness evident in its consideration . . . .'") (citations omitted).

CONCLUSION

The judgment of the Court of Appeals should be reversed. The FCC's Report and Order should be vacated insofar as it preempts local and state technical standards which are simply more stringent than the FCC's incomplete and outdated standards. The FCC should be instructed that it may preempt only those standards which actually conflict with particular standards established by it.

Respectfully submitted.

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RESPONDENT'S

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OCTOBER TERM, 1987

CITY OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Federal Communications Commission exceeded its statutory authority in adopting regulations that prescribe technical standards governing the quality of cable television signals and forbid local authorities from imposing more stringent technical standards.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-339

CITY OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-48) is reported at 814 F.2d 720. The report and order of the Federal Communications Commission (Pet. App. 49-95) is reported at 50 Fed. Reg. 52462.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1987, and a petition for rehearing was denied on May 27, 1987 (Pet. App. 1). The petition for a writ of certiorari was filed on August 25, 1987, and was granted on November 30, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Cable television systems transmit "a variety of broadcast and nonbroadcast signals obtained from several

sources" to subscribers for a fee. *Capital Cities Cable, Inc.* v. *Crisp,* 467 U.S. 691, 700-701 (1984). The Federal Communications Commission (FCC or Commission) began regulating cable television systems in the 1960's. The Commission's early regulations principally concerned rules for cable systems' carriage of television broadcast signals. *Id.* at 701-702; *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 165-167 (1968).[1]

The Commission revised its cable television regulatory regime in 1972. Rather than importing into the cable television context a federal licensing system, the Commission adopted a program of " 'deliberately structured dualism' " (*Capital Cities,* 467 U.S. at 702 (citation omitted)). It allocated to state and local authorities "responsibility for granting franchises to cable operators within their communities and for overseeing such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way" (*ibid.*). The Commission retained "exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Ibid.; Cable Television Report and Order,* 36 F.C.C.2d 143, 170-176, 207-210, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd, *American Civil Liberties Union* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975); see also *Cable Television (Clarification and Notice),* 46 F.C.C.2d 175, 178 (1974).[2]

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[1] The Commission early recognized that technical standards governing the quality of cable signals might have to be set, but it did not take immediate action in that area. See *CATV (Notice of Inquiry and Proposed Rulemaking),* 1 F.C.C.2d 453, 476 (1965).

[2] The Commission characterized this dual regulatory scheme as an accommodation of its responsibility "to assure the orderly development of this new technology into the national communications structure" with the local interest in regulating the use of community streets and rights of way. *Duplicative and Excessive Over-Regulation of Cable Television,* 54 F.C.C.2d 855, 861, 863 (1975).

In exercising its authority to regulate the technical and operational aspects of cable television systems, the Commission divided cable services into four categories: Class I cable channels, which are channels used to deliver the signals of television broadcast stations; Class II channels, which are "used for delivering non-encoded 'cablecast' programming such as Cable News Network, ESPN, and public, educational, and governmental access programming"; Class III channels, which deliver "encoded cablecast programming such as Home Box Office and other pay channels"; and Class IV channels, which provide "two-way transmission capability allowing subscribers to return information to the control point." Pet. App. 8-9; *Cable Television Report and Order,* 36 F.C.C.2d at 198-199; 47 C.F.R. 76.5(f)-(w) (1986). The Commission prescribed minimum technical standards to govern the signal quality of Class I channels; it did not establish technical standards for the other channel classes. In 1972, when the Commission issued its technical standards, no state or franchising authority had adopted such standards and the Commission found no reason at that time to preempt local authority in that area. *Cable Television Report and Order,* 36 F.C.C.2d at 198-201; *id.* at 359-360 (on reconsideration).

Over the next few years, as local franchising authorities began to adopt their own technical standards, the Commission became concerned that "unrealistic" local standards might "hamper the development of cable television because technical equipment could not be manufactured for nationwide use." *Cable Television,* 46 F.C.C.2d at 178. The Commission thus began a rulemaking proceeding to determine whether to preempt local regulation of technical standards governing signal quality. *Ibid.*

After considering comments, the Commission found "a compelling need for national uniformity in cable television technical standards." *Cable Television,* 49 F.C.C.2d 470,

477 (1974). The Commission emphasized that it was concerned only with "technical performance standards," which it defined as "standards that are quantitative definitions of the electrical or optical characteristics of a signal source, transmission system, or terminating device. Such standards speak only to the shaping, amplification, attenuation, purity, etc., of the signals carried on cable systems" (*id.* at 471). The Commission distinguished those technical standards from "mechanical or equipment standards" relating to a piece of equipment's ability to stand up to the environment and to "the channel capacity of a system, protection against electrical supply outages, the placement of structures, construction practices, or electrical safety code enforcement" (*id.* at 471-472).

The Commission stated that it was "increasingly clear * * * that cable television is becoming an integral link in" the nationwide wire and radio communications system (*Cable Television,* 49 F.C.C.2d at 478). It further stated that "[t]he long term goal of an efficient nationwide communications system cannot be achieved if one segment of that system develops with a multiplicity of jurisdictionally mandated, non-uniform, technical characteristics that may result in incompatibility. Whatever the transmission medium, electromagnetic signals do not change their characteristics according to political boundaries" (*ibid.*).

The Commission observed that its experience under its prior decision to permit the promulgation of technical standards by franchising authorities showed the adverse effect of local regulation in this area. It found that local technical standards have "cover[ed] the entire range of possibilities from highly sophisticated standards * * * to clearly unworkable or impossibly excessive demands" (49 F.C.C.2d at 478). The Commission found that some stringent local standards had had the "unforeseen result of * * * effectively prohibit[ing] the use of low-cost video equipment in

favor of broadcast quality equipment" and had thereby made independent cable programming "economically prohibitive" (*id.* at 479). The Commission also found that nonuniform technical parameters might "have a deleterious effect on the development of new cable services" because "[u]niformity in the parameters of the technical characteristics for data transmission is essential to the successful use of cable for this purpose" (*ibid.*). Finally, the Commission found that "the development and marketing of signal source, transmission, and terminal equipment could be seriously impeded by non-uniform standards" because manufacturers would be required to comply with a variety of different standards (*ibid.*). In order to avoid those problems, the Commission concluded that it was appropriate to "rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jursidictions" by preempting local regulation of technical standards (*id.* at 480).[3]

This Court in 1984 affirmed the Commission's preemption authority in sweeping terms in *Capital Cities Cable, Inc.* v. *Crisp, supra,* which involved a state law prohibiting cable operators from carrying broadcast programs containing commercials for alcoholic beverages. The Court stated that the Commission's "comprehensive" authority to regulate all aspects of interstate communication by wire or radio includes the power to regulate cable television systems, and that this authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities' " (467 U.S. at 700 (citation omitted)). Thus, "if the FCC has resolved to pre-empt an area of cable television regulation and if this determination

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[3] The Commission adopted a waiver procedure to permit showings in particular cases that more stringent technical standards were necessary (49 F.C.C.2d at 477-478).

'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, [the Court] must conclude that all conflicting state regulations have been precluded" (*ibid.* (citation and footnote omitted)). Finding that the Commission had retained "exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards," the Court concluded that a state law regulating commercial advertising was invalid because the statute "interfered with a regulatory area that the Commission has explicitly preempted." *Id.* at 702, 705 (footnote omitted); see also *New York State Comm'n* v. *FCC,* 749 F.2d 804 (D.C. Cir. 1984).

2. In 1984, Congress amended the Communications Act of 1934 (Communications Act) by adopting the Cable Communications Policy Act of 1984, 47 U.S.C. (Supp. III) 521 *et seq.* (Cable Act), to "clarif[y] the current system of local, state and Federal regulation of cable television." H.R. Rep. 98-934, 98th Cong., 2d Sess. 19 (1984). Acting against the background we described above, Congress sought to "preserve the critical role of municipal governments in the franchise process," while at the same time "defining and limiting the authority that a franchising authority may exercise through the franchise proeess" (*ibid.*). Congress also sought to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. (Supp. III) 521(6); see also H.R. Rep. 98-934, *supra,* at 20. The statute affirmed the FCC's "exclusive jurisdiction over cable service, over all persons engaged in the provision of cable service, and over the facilities which relate to such service, as provided in" the Cable Act (H.R. Rep. 98-934, *supra,* at 95).

The Cable Act permits local franchising authorities to select cable franchisees (47 U.S.C. (Supp. III) 541) and to specify the services that a franchisee must provide (47 U.S.C. (Supp. III) 541(a)). At the same time, the statute explicitly limits the powers of local franchising authorities.

See, *e.g.*, 47 U.S.C. (Supp. III) 542 (prohibiting assessment of a franchise fee greater than five percent annually); 47 U.S.C. (Supp. III) 543 (barring regulation of cable rates except where there is no effective competition); 47 U.S.C. (Supp. III) 546 (specifying conditions under which a franchise must be renewed).

The provision of the Cable Act directly pertinent to this case is Section 624 (47 U.S.C. (Supp. III) 544), which is entitled "Regulation of services, facilities, and equipment." Section 624(a) states that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter" (47 U.S.C. (Supp. III) 544(a)). The next subsection permits local franchising authorities to "establish requirements for facilities and equipment" (47 U.S.C. (Supp. III) 544(b)(1)). Section 624(e) states that the FCC "may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise" (47 U.S.C. (Supp. III) 544(e)). This subsection allows the Commission "to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchise agreement" (H.R. Rep. 98-934, *supra,* at 70). But it "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection" (*ibid.*).

3. In April 1985, the Commission issued a notice of proposed rulemaking regarding its cable television technical standards. See 50 Fed. Reg. 7801-7804 (1985). The Commission observed that its technical standards "were adopted at a time when the cable industry was little more than a series of master antenna systems for communities. The only competition to the service was over-the-air broadcasting" (*id.* at 7801). "Since 1972," the Commission stated, "competition

has increased from several sources, including video cassette recorders, satellite home earth terminals, and multipoint distribution systems. It therefore seems appropriate to reevaluate the technical requirements at this time" (*ibid.*).

The Commission proposed to end federal enforcement of technical standards and instead proposed to publish such standards as guidelines that local authorities could include in franchise agreements (see 50 Fed. Reg. 7802 (1985)). The Commission observed that it had preempted local jurisdiction in the area of technical requirements in order to "prevent any adverse impact on the growth of cable television because of the imposition of overly burdensome technical requirements at the local level" (*ibid.*). Because the Commission "continue[d] to believe that this concern is valid and that there should be a national policy in the technical area," it proposed to continue that policy (*ibid.*).

After considering comments, the Commission adopted a modified version of the proposed rule (Pet. App. 49-95). The Commission was "persuaded that in the vast majority of situations the severe penalties that will be imposed in the marketplace for those operations that do not perform satisfactorily far exceed and can safely be used to replace FCC penalties that might be imposed through the regulatory process" (*id.* at 65-66). In light of that circumstance, and of the continuing authority of state and local franchising authorities to enforce federally prescribed technical standards, the Commission concluded that "federally enforced standards are no longer necessary or desirable" (*id.* at 66).

The Commission found it appropriate "to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations" (Pet. App. 66-67). The Commission observed that "[t]echnical standards that vary from community to community create potentially serious negative consequences

for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes" (*id.* at 66). The Commission stated that its longstanding policy of preempting stringent local regulation of technical standards was designed to avoid those adverse effects, and found that "[t]he reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted" (*id.* at 68). Noting that cable television was now offered in more than 18,500 communities, the Commission explained that the cost to equipment suppliers of "keeping track of and complying with numerous different requirements is undeniably significant and there appear to be few if any countervailing benefits associated with such disparate requirements" (*id.* at 69).[4]

Finally, the Commission concluded that its authority to preempt local regulation of technical standards had not been altered by the Cable Act. The Commission observed that its policy is "wholly consistent with the Cable Act's intent to establish a national policy that encourages the growth and development of cable television services" (Pet. App. 73 (footnote omitted)). Citing Section 624(e), which expressly empowers the Commission to issue technical standards, the Commission stated that the Act "appears to specifically anticipate the continuation of our existing policy" (Pet. App. 72). The Commission found "nothing in the legislative history that suggests Congress did not approve of the ex-

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[4] The Commission further found that disparate local technical standards might well deter technological innovation. The Commission stated that "[t]he obstacles that would be created to such innovation were it necessary to win the approval of numerous franchise authorities before use was possible would be most formidable, even if local authorities were equipped to respond to the sophisticated technical issues involved" (Pet. App. 71).

isting policy or that it intended to limit our ability to continue it" (*id.* at 72-73 (footnote omitted)).

4. Petitioners sought judicial review of the Commission's rule under 47 U.S.C. 402(a). The scope of such review is governed by the Administrative Procedure Act (5 U.S.C. 706). The court of appeals upheld the Commission's rule in part and vacated the rule in part (Pet. App. 4-48). The court first considered the Commission's authority to preempt local regulation of technical standards governing signal quality. It observed that " '[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law' " (*id.* at 17, quoting *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)). "Since Congress legislated against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation," the court said, "we infer that Congress endorsed it, except where the Cable Act explicitly or implicitly modified its provisions" (Pet. App. 19-20).

The court of appeals looked to Section 624 of the Cable Act to determine whether Congress intended to modify prior law. It observed that Congress permitted local franchising authorities to "establish requirements for facilities and equipment" to be provided by the cable operator (47 U.S.C. (Supp. III) 544(b)(1)), but at the same time "clearly limit[ed] a franchisor's freedom of action" (Pet. App. 21) by stating that "any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the statute (47 U.S.C. (Supp. III) 544(a)). The court stated that Section 624(e) (47 U.S.C. (Supp. III) 544(e)), which authorizes the FCC to establish technical standards relating to facilities and equipment, "indicates [that] the authority to curtail [the franchisors'] freedom of action was delegated to the FCC, at least insofar as the FCC's 'technical standards' overlap the

franchisors' specifications of certain 'services, facilities and equipment' " (Pet. App. 21 (citation omitted)).

The court observed that the legislative history of Section 624(e) supports its interpretation. The court quoted the passage of the House Committee Report stating that the delegation of authority to the Commission " 'does not affect the authority of a franchising authority to establish standards regarding facilities and equipment . . . which are *not inconsistent with standards established by the FCC* under this subsection' " (Pet. App. 21-22 (citation omitted; emphasis added by the court of appeals)). It concluded that the phrase "not inconsistent with" authorizes the preemption of any technical standard that exceeds a standard set by the FCC. Finding that the Commission's broad authority under Section 624(e) allows it to decide "that a certain level of regulation is *all* that is desirable" (Pet. App. 26 (emphasis in original)), the court upheld that portion of the Commission's regulation setting technical standards for Class I channels and forbidding local authorities from imposing stricter standards.

The court of appeals, however, vacated that part of the FCC's regulation barring franchise authorities from setting technical standards for Class II, III, and IV channels, while forbearing from setting technical standards itself. The court noted that the provision of the Cable Act governing the renewal of cable television franchises permits a franchising authority to consider signal quality in deciding whether to renew a franchise (see 47 U.S.C. (Supp. III) 546(c)(1)(B)). It stated that the Commission's refusal to adopt technical standards for Classes II, III, and IV, combined with its policy of forbidding franchising authorities from adopting such standards, "seems to put franchisors in a 'Catch-22' position": a franchising authority can evaluate a cable operator's signal quality only by reference to objective technical standards, but no such standards have been

adopted by the FCC and standards may not be adopted by the franchising authority (Pet. App. 32). The court concluded, therefore, that the Commssion has "an obligation explicitly to consider the interrelationship between" the statutory provision governing technical standards (§ 624) and the provision governing franchise renewals (§ 626, 47 U.S.C. (Supp. III) 546) (Pet. App. 34-35). The court directed the Commission to consider that interrelationship on remand. Review has not been sought from that aspect of the court of appeals' judgment.[5]

Judge Mikva dissented (Pet. App. 35-48). He concluded that the Cable Act allows local franchising authorities to impose technical standards more stringent than the standards adopted by the Commission.

SUMMARY OF ARGUMENT

1. Section 624(e) of the Cable Act gives the FCC the power to "establish technical standards relating to the facilities and equipment of cable systems." Congress placed no restrictions on this authority. No other provision of the Cable Act expressly permits any other federal, state, or local entity to set technical standards. Hence, the Commission acted within the scope of its authority under Section 624(e) when it used its broad rulemaking power to set the outer limits on technical standards that local authorities may impose on cable systems.

2. The history and background of the Cable Act confirm that Congress intended to confer upon the Commis-

[5] As a practical matter, the FCC's technical standards for Class I channels may apply to all classes because all cable transmissions are carried over essentially the same equipment. On remand, therefore, the FCC may reach the same result after considering the court of appeals' concern. Nevertheless, at this time, the only matter before the Court is the FCC's current regulation concerning Class I channels.

sion plenary authority under Section 624(e) to set technical standards. Prior to the Cable Act, the FCC asserted power to set the limits on "technical standards" that may be applied to cable operators. The FCC, however, left to local authorities the authority to set other requirements for facilities and equipment. Congress adopted precisely this same distinction between "technical standards" and "requirements for facilities and equipment" when it passed the Cable Act. Congress conferred upon the Commission the power to set technical standards and permitted local franchising authorities to establish requirements for equipment and facilities. In so doing, Congress expressly recognized that the Commission's technical standards – whatever they are – would prevail over inconsistent local requirements. At the very least, therefore, the structure of the Cable Act and Congress's division of responsibilities are consistent with the FCC's decision to set the maximum technical standards that may be imposed on cable operators.

3. The Commission's regulations reasonably and properly implement the federal statutory purposes of the Cable Act. One purpose of the Act was to "minimize unnecessary regulation." The Commission, after considering the competing interests, reasonably set limits on government regulation of technical standards so as to encourage expansion and innovation in the cable industry. The Commission's action was not arbitrary or capricious, was not precluded by Congress, and was adopted in furtherance of statutory policies whose implementation was committed by Congress to the Commission.

ARGUMENT

CONGRESS GAVE THE COMMISSION AUTHORITY TO SET MAXIMUM TECHNICAL STANDARDS GOVERNING THE QUALITY OF CABLE TELEVISION SIGNALS

This case is an action brought pursuant to the Communications Act and the Administrative Procedure Act to challenge the authority of the FCC to issue regulations that set the outer limit of technical standards that franchising authorities may require for cable television signal carriage. The FCC regulations expressly preempt some local regulatory authority; local authorities may not enforce more stringent technical standards for cable signals.[6] The question before the Court is whether the Commission, in adopting the regulations, acted "in excess of statutory jurisdiction, authority, or limitations" (5 U.S.C. 706(2)(C)).

Accordingly, petitioners err in asserting (Br. 15) that this Court must look for " 'clear' or 'unmistakable' Congressional intent to preempt technical standards." Congress did not enact the regulations under review; the Commission adopted them. And the Commission's expression of preemptive intent could not be clearer—"No technical parameter in excess of the [FCC standards] may be required" (Pet. App. 87). Thus, the Court's inquiry necessarily must be whether the agency has acted within the scope of its statutory

[6] This Court has, of course, repeatedly held that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986). See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982); *United States* v. *Shimer*, 367 U.S. 374, 383 (1961). Here, the FCC's regulations do not preempt all local authority to enforce technical standards regarding signal quality; local franchising authorities simply must work within the limits set by the FCC's standards.

authority, in furtherance of the federal statutory purposes, and has not exceeded limitations imposed by Congress.

In answering those questions, the courts must fully recognize any role Congress intended to confer upon or preserve for the states (see, *e.g.*, *Louisiana Public Service Comm'n* v. *FCC*, *supra*) and should not lightly infer congressional authorization of displacement of the states from traditional areas of their regulatory authority (see *De La Cuesta*, 458 U.S. at 172 (O'Connor, J., concurring)). But neither of those considerations—to which normal principles of deference to an agency's interpretation of its statutory authority must give way in appropriate cases—applies here. On the contrary, Congress expressly recognized the power of the Commission to preempt local regulation in this area when it noted that local franchising authorities could not impose requirements on cable operators that are "inconsistent with standards established by the FCC" (H.R. Rep. 98-934, *supra*, at 70). Indeed, here, as in *United States* v. *Riverside Bayview Homes, Inc*, 474 U.S. 121 (1986), the "language, policies, and legislative history" (*id.* at 131) of the Communications Act and the Cable Act support the Commission's interpretation of its authority. The Commission's decision to prescribe the limits of technical standards requirements for cable signals should therefore be upheld.[7]

A. The Language of the Cable Act Gives the FCC Plenary Authority Over Technical Standards for Cable Television Signals

In enacting the Cable Act, Congress broadly granted the FCC "jurisdiction over cable service, over all persons engaged in the provision of cable service, and over the facilities

[7] Contrary to petitioners' suggestion (Br. 25-27), the Commission did not use policy arguments to stretch its authority beyond congressionally sanctioned limits. The Commission set forth its policy determinations to explain the reasons for its exercise of discretion, not to justify its power to act. See Pet. App. 72-74.

which relate to such service, as provided in" the Cable Act (H.R. Rep. 98-934, *supra,* at 95). The specific provisions of the Cable Act give this sweeping mandate precise content. Of particular relevance here, Section 624(e) of the Cable Act provides: "The Commission may establish technical standards relating to the facilities and equipment of cable systems" (47 U.S.C. (Supp. III) 544(e)). No other provision of the Act expressly permits any other federal, state, or local entity to set technical standards. In addition, Section 303(r) of the Communications Act (47 U.S.C. 303(r)), which encompasses the provisions of the Cable Act, states that the Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the statute.

Undoubtedly, under these provisions, the Commission, if it had seen fit to do so, could have prescribed uniform technical standards directly applicable to all cable operators. See generally *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 721 (1985). Any attempt by a local franchising authority to require a particular cable operator to deviate from those standards – by requiring conformance to a higher or lower locally prescribed standard – would then obviously be preempted as conflicting with the federal regulation. Here, the Commission has instead found it appropriate to allow local franchising authorities a substantial measure of discretion in determining whether and to what extent they will utilize franchising agreements to enforce technical standards on cable operators. The Commission's regulations merely prescribe the maximum standards that may be required. Local franchising authorities are free to choose to enforce technical standards or not, to any extent up to that maximum, as they see fit.[8] This more

[8] Higher standards, of course, may voluntarily be used by cable operators, but local authorities are forbidden to require them.

limited prescription by the Commission of a technical standards criterion is, we submit, no less valid than would be the more rigid regulation hypothesized at the beginning of this paragraph. It is no less a valid exercise by the Commission of its rulemaking authority under the Communications Act to set "technical standards" (47 U.S.C. (Supp. III) 544(e)) governing the quality of cable television signals.[9]

Congress could have included provisions in the Cable Act that limited the Commission's authority to set technical standards. For example, Section 1 of the Communications Act (47 U.S.C. (Supp. III) 151) gives the FCC broad authority to regulate "interstate and foreign commerce in communication by wire and radio," but Section 2(b) of the same Act (47 U.S.C. (Supp. III) 152(b)) withdraws any jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." See *Louisiana Public Service Comm'n* v. *FCC, supra.* See also *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) (Section 3(h) of the Communications Act (47 U.S.C. 153(h)) withdraws FCC authority to adopt regulation that makes a broadcaster a common carrier). Congress, however, included no provision in the Cable Act to restrict the Commission's authority to set technical standards for signals carried through cable systems.[10]

[9] Petitioners apparently prefer more stringent standards. Petitioners, however, did not challenge the standards as such in the court of appeals. In any event, this disagreement with the standards chosen by the Commission does not detract from the fact that the Commission was carrying out its mandate to set technical standards when it prescribed a level that local authorities may not require to be exceeded.

[10] Petitioners contend (Br. 20-22) that the Commission's rule is inconsistent with Section 626(c)(1)(B) of the Cable Act, 47 U.S.C. (Supp. III) 546(c)(1)(B), which provides that franchising authorities may consider, among other things, a cable operator's "signal quality" when deciding whether to renew a franchise. Plainly, however, there is no conflict. Local franchising authorities can fulfill their duty by evaluating

Petitioners would add an unwritten restriction to Section 624(e) of the Cable Act. Petitioners essentially argue that Congress authorized the Commission only to set minimum technical standards that may be supplemented by more stringent local regulations—*i.e.*, that the Commission has no power to set the maximum technical standards that may be required of cable companies regardless of their location in the United States and regardless of the adverse impact of diverse and more stringent technical standards. Petitioners' proposed restriction, however, would seriously tie the Commission's hands in a way nowhere expressed by Congress.

Instead, Congress comprehensively empowered the Commission to set technical standards for cable television signals, as an aspect of the Commission's broad charter to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service" (47 U.S.C. 151). In the words of this Court in *Capital Cities Cable, Inc.* v. *Crisp* (467 U.S. at 708), "the Commission has determined that only federal preemption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country." The FCC's judgment regarding the rigorousness of appropriate technical standards requirements throughout the country "may not enjoy universal support," but "it plainly represents a reasonable accommodation of the competing policies *committed to the FCC's care*" (*ibid.* (emphasis added)).

As petitioners note (Br. 24 n.20), the holding of the Court in *Capital Cities* does not control the outcome of this case.

signal quality under the published federal standards, which the Commission has found will ensure that every cable subscriber will receive an acceptable quality of service (Pet. App. 54-55).

We submit, however, that the Court's analysis in that case is dispositive here. The Court there observed, even prior to the Cable Act, that the FCC had "authority to regulate the signals carried by cable television systems" (467 U.S. at 699). The Court further stated that, within this domain, the FCC had authority to preempt local regulation if the Commission's decision was reasonable (*id.* at 700). The Cable Act reaffirmed without limitation the FCC's authority to set "technical standards" (47 U.S.C. (Supp. III) 544(e)). It follows that, under the Court's reasoning in *Capital Cities*, the FCC's decision to preempt local regulation of technical standards must be upheld if reasonable (see pp. 25-26, *infra*).

In sum, Section 624(e) of the Cable Act does not require the FCC to regulate—or to permit local regulation—to the greatest extent possible. Section 624(e) simply gives the FCC plenary jurisdiction over the question of technical standards governing cable signals.[11] And "when federal officials determine, as the FCC has here, that restrictive regulation of [technical standards governing cable signals] is not in the public interest, 'States are not permitted to use their police power to enact such a regulation.' " *Capital Cities*, 467 U.S. at 708 (quoting *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151,

[11] In our brief in opposition to the petition for a writ of certiorari, we noted (Br. in Opp. 16) that several provisions of the Cable Act (*e.g.*, 47 U.S.C. (Supp. III) 542(i), 543(a), 544(f)(1)) bar the Commission from adopting certain regulations even though the Cable Act does not otherwise expressly grant the Commission the authority to take those actions. It appears, therefore, that Congress may well have intended for the Commission to retain its broad authority under the Communications Act "to regulate the signals carried by cable television systems" in the absence of an express limitation (*Capital Cities*, 467 U.S. at 699). The Court need not address this question, however, because Section 624(e) of the Cable Act expressly gives the Commission the authority to set technical standards—including the acceptable range of those standards—that local authorities may require in their franchises.

178 (1978)). Accordingly, the Commission did not exceed its authority in setting technical standards that local regulators may not surpass.

B. The History and Background of the Cable Act Confirm that Congress Intended to Confer upon the Commission Comprehensive Authority to Set Uniformly Applicable Technical Standards

Contrary to petitioners' contention (Br. 16-19), the legislative history of the Cable Act does not support an implicit limit on the Commission's authority under Section 624(e) to set the maximum technical standards that may be required throughout the country. Indeed, far from indicating that the Commission's decision "is not one that Congress would have sanctioned" (*United States v. Shimer*, 367 U.S. at 383), the Cable Act's history and background confirm that the Act's language was intended to give the Commission precisely that authority.

Ten years before the passage of the Cable Act, the Commission decided to assert exclusive authority to set technical standards for cable television signal carriage. See *Cable Television*, 49 F.C.C.2d at 470. The Commission concluded that diverse local technical standards would impair the achievement of an efficient and innovative cable television system across the nation. The Commission, therefore, barred local regulators from imposing technical standards more stringent than those adopted by the Commission (*id.* at 480).

The FCC, in preempting local authority in this area at that time, gave the term "technical standards" a precise meaning. The Commission made it clear that "technical standards" meant "quantitative definitions of the electrical or optical characteristics of a signal source, transmission system, or terminating device" (49 F.C.C.2d at 471). The Commission further specified that "[s]uch standards speak only to shaping, amplification, attenuation, purity, etc. of

the signals carried on cable systems" (*ibid.*). The Commission assumed exclusive jurisdiction only over such precisely defined "technical standards." The Commission did not limit local authority to set and enforce other standards that relate to a cable system's design, facilities, or equipment (*id.* at 471-472). Those other standards included "mechanical or equipment standards designed to protect, for example, against extraordinarily corrosive environments, daily or seasonal temperature extremes, high winds" and the like (*ibid.*). Non-technical standards left to local authority also included requirements "concerned with the channel capacity of a system, protection against electrical supply outages, the placement of structures, construction practices, or electrical code safety enforcement" (*id.* at 472).

This distinction between "technical standards" (under the jurisdiction of the FCC) and other requirements relating to cable facilities and equipment (under the jurisdiction of local authorities) was carried over into the Cable Act.[12] As we have noted, Section 624(e) of the Cable Act expressly gives the FCC authority to establish "technical standards." Since there is no indication to the contrary, Congress must be presumed to have adopted the FCC's established meaning of the term "technical standards." See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980).

Indeed, Congress's preservation of the established division of regulatory authority is further confirmed by the Cable Act's provision permitting local franchising authorities to "establish requirements for facilities and equipment" (47 U.S.C. (Supp. III) 544(b)). The House Committee Report made clear that this phrase refers to the type of non-technical requirements historically left by the FCC to local authorities. See H.R. Rep. 98-934, *supra*, at 68.

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[12] In the interim, this Court affirmed the FCC's sweeping preemption authority in *Capital Cities*.

Those requirements were specified to include "channel capacity; system configuration and capacity * * *; headends and hubs; two-way capability; addressability; trunk and feeder cable; and any other facility or equipment requirement, * * * including microwave facilities, antennae, satellite earth stations, uplinks, studio and production facilities, vans and cameras * * * " (*ibid.*). Significantly, the House Committee Report did not refer to "technical standards" as within the domain of local authorities.[13]

The language of the Cable Act further confirms the Act's preservation of this longstanding division of regulatory authority. Section 624(a) of the Act states that a local "franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the Cable Act (47 U.S.C. (Supp. III) 544(a)). Congress plainly intended this Section to "impose limitations on a franchising authority." H.R. Rep. 98-934, *supra,* at 68. Under the scheme established by Congress, therefore, a local franchising authority must find an express provision in the Cable Act that allows local regulation before it may impose a specific type of requirement. This is reconfirmed by Section 624(f) of the Act (47 U.S.C. (Supp. III) 544(f)), which provides: "Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in" the Cable Act. But nothing in the Cable Act or the regulations promulgated by the FCC permits local authorities to set technical standards of the type at issue in this case. Hence, at the very least, the structure of the Cable Act and Congress's division of responsibilities are consistent with the Commission's decision to assert exclusive jurisdiction over the maximum technical standards that may be imposed on cable operators.

[13] Congress's distinction between "technical standards" and "requirements for facilities and equipment" is also evident in the House Committee Report statement that the FCC may "set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchise agreement" (H.R. Rep. 98-934, *supra,* at 70).

Petitioners' primary argument (Br. 17-19) is that one statement in the legislative history of Section 624(e) of the Cable Act, the provision which gives the FCC authority to set technical standards, shows that Congress intended to limit the FCC's ability to preempt local technical standards. The House Committee Report states that Section 624(e) "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to [S]ection 624(b) which are not inconsistent with standards established by the FCC" (H.R. Rep. 98-934, *supra,* at 70). Petitioners apparently read this statement as creating an enclave of local authority over technical standards that the FCC may not preempt.[14] Petitioners' view is mistaken.

The House Committee Report's language may well not have been intended to say anything at all about local authority to set technical standards of the type involved in this case. The Commission clearly is given authority to set technical standards under Section 624(e); local authorities may set other requirements for facilities and equipment under Section 624(b). It is certainly possible that the Commission's technical standards could conflict with local requirements regarding equipment. The House Committee Report can be

[14] Perhaps petitioners view this language merely as evidence that Congress (as distinguished from the FCC) did not itself preempt local authority to set technical standards more stringent than those established by the FCC. If that is petitioners' argument (see Br. 18-19), it is beside the point. As we have stated, the question is not whether Congress required the FCC to adopt its regulation preempting local authority to set more stringent technical standards; the question is whether Congress precluded the Commission from utilizing that means of performing its delegated task of prescribing technical standards.

read as simply and reasonably noting that, in such a case, the FCC's technical standards prevail.

Alternatively, the language in the House Committee Report may have been intended to recognize that local authorities, through franchising agreements, may enforce technical standards that are not inconsistent with FCC regulations. But under this interpretation of the Report, no less than the other, Congress has expressed no intention to limit the FCC's power to preempt local regulation of technical standards. On the contrary, as we have shown, the Report acknowledges the FCC's authority in this discrete area to supersede inconsistent local standards.

This is a facial challenge to the FCC's regulations; the Court does not have a specific local standard to examine to determine whether it is consistent with the FCC standards. Plainly, however, a certain type of local standard would be inconsistent with the FCC's regulations. A locally imposed standard that exceeded the FCC's standard would conflict with the FCC's regulations because the Commission specified that its standards are the maximum allowable requirements. The Commission certainly could have written a different regulation. The Commission could have set federal technical standards and permitted local authorities to enforce stricter standards. If that were the FCC's regulation, then a more stringent local standard would be consistent with the FCC's standards.[15] But the FCC did not adopt such a rule; it promulgated standards that expressly set the outer limit of permissible government regulation.[16]

[15] As petitioners note (Br. 18-19), this is the type of legal rule that Congress elected to incorporate in certain other provisions of the Cable Act. That Congress did so in those provisions and not here, however, serves more to undermine than to support petitioners' argument.

[16] The FCC's regulation is therefore analogous to federal statutes prohibiting more stringent state and local regulation (see, *e.g.*, 21 U.S.C. 678; 15 U.S.C. 1392(d)). Any requirement of state law in those areas (*e.g.*, motor vehicle safety standards) that exceeds federal standards is inconsistent with the federal statute and thus preempted.

Accordingly, a more stringent local standard is "inconsistent with standards established by the FCC" (H.R. Rep. 98-934, *supra*, at 70).

C. The Commission's Regulations Reasonably And Properly Implement the Federal Statutory Purposes

Congress stated that one of its purposes in enacting the Cable Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems" (47 U.S.C. (Supp. III) 521(6)). And the FCC's broad mission is to make widely available an efficient "communication service with adequate facilities at reasonable charges" (47 U.S.C. 151). See *Capital Cities*, 467 U.S. at 708. In furtherance of those statutory policies and mandate, the FCC reasonably determined that it should set the outer limits on technical standards requirements for cable television signals.

The Commission noted that the standards it established would ensure that every subscriber—even those in the "worst subscriber location" (Pet. App. 55 n.2)—would receive an acceptable signal. On the other hand, the Commission observed that "[t]echnical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of cost of service and the ability of the industry to respond to technological changes" (*id.* at 66). The cost of monitoring and complying with "numerous different requirements is undeniably significant and there appear to be few if any countervailing benefits" (*id.* at 69). The Commission also gave weight to "the potential detrimental impact of such [diverse technical] standards on technological

innovation in the industry" (*id.* at 69-70). And innovation in the cable industry is vital as "cable television systems operate in an increasingly competitive environment" (*id.* at 65).

In sum, on the basis of its extensive experience in regulating cable television, the Commission concluded that its preemption policy, under which cable television had made significant advances, was as valid now as it had been when it was originally adopted in 1974 (Pet. App. 68). In particular, the Commission found that its policy would free the developers and manufacturers of equipment to plan and build for a nationwide market; consumers would thereby benefit from lower costs and cable systems that are more adaptable to advances in technology (*id.* at 66).

The Commission's judgment as to how best serve the public interest is entitled to "substantial judicial deference." *FCC* v. *WNCN Listeners Guide*, 450 U.S. 582, 596 (1981). Its judgment here is a reasonable accommodation of the competing policies committed to its care. Petitioners may disagree with the FCC's decision and its assessment of the competing interests. It is clear, however, that the Commission's order setting an outer limit on the requirement of technical standards was not "arbitrary or capricious" (*De La Cuesta*, 458 U.S. at 141), was not precluded by Congress, and was adopted in furtherance of statutory policies whose implementation was committed by Congress to the Commission.

CONCLUSION

The judgment of the court of appeals, insofar as it is under review in this Court, should be affirmed.

Respectfully submitted.

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BRIEF

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IN THE

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OCTOBER TERM, 1987

CITY OF NEW YORK, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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QUESTION PRESENTED

Did the court below correctly conclude that the Federal Communications Commission has the authority to adopt rules prohibiting state and local governments from establishing cable television technical standards more stringent than standards established by the Commission?

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---

BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Respondent National Cable Television Association, Inc. ("NCTA"), respectfully submits this brief urging affirmance of the judgment of the United States Court of Appeals for the District of Columbia in this case. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 80 percent of the nation's approximately 43 million cable subscribers.[1]

[1] NCTA has no parent companies, subsidiaries or affiliates. In addition to cable system owners and operators, NCTA's members include cable programmers, equipment manufacturers, consultants, and other businesses and individuals affiliated with or interested in the cable television industry.

STATEMENT OF THE CASE

This case involves a challenge to regulations of the Federal Communications Commission (the "Commission") that govern the technical standards applicable to facilities and equipment used by cable television systems. The Commission took a two-part approach to the development of technical standards, establishing specific minimum guidelines for use by local franchising authorities and leaving more advanced standards to be set by industry practice rather than by either federal or local regulation. The Court of Appeals upheld the regulations, finding that the Commission's judgments were within the scope of its express authority to establish technical standards under Section 624(e) of the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 544(e).

1. Cable television developed in the late 1940's and early 1950's as a means of providing enhanced reception of over-the-air broadcast television signals to communities that, because of geographic factors, were unable to receive such signals by conventional means.[2] From a technical standpoint, these early cable systems offered little more than a master antenna service, picking up broadcast signals off the air and redistributing them to subscribers by wire. However, by the 1970's, cable had evolved significantly. In addition to retransmitting local broadcast signals received off the air, cable systems were capable of providing subscribers with access to more distant programming received by terrestrial microwave or satellite as well as programming originated by the cable operators themselves.

The history of the Commission's regulation of cable television technical standards began in 1972. By then, the cable television industry had developed to the point

[2] *See generally United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

where the Commission deemed it necessary to adopt a comprehensive program of federal regulation to govern the industry.[3] As part of that regulatory program, the Commission promulgated a set of objective, quantitative technical standards for cable systems.[4]

The standards adopted by the Commission were designed to serve a variety of purposes. For example, several of the standards established frequency boundaries and signal strength tolerances aimed at ensuring that the signals delivered by the cable system would be compatible with subscribers' television sets.[5] Other standards more

[3] *See generally Cable Television Report and Order*, 36 F.C.C.2d 143, *recon.*, 36 F.C.C.2d 326 (1972). During the early years of cable television, the Commission took the position that it lacked jurisdiction to regulate the industry. *See Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), *recon. denied, Report and Order in Docket No. 12443*, 26 F.C.C. 403, 428 (1959). Subsequently, however, the Commission reversed itself and asserted jurisdiction over cable as necessary to fulfill the Commission's mandate under the Communications Act. This court upheld the Commission's jurisdiction over cable in *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

[4] *Cable Television Report and Order*, 36 F.C.C.2d at 200-202. The standards adopted applied specifically to "Class I" channels. Class I cable channels were defined as those channels which are used for the retransmission of broadcast television signals. 47 C.F.R. § 76.5(t). The Commission's rules also identified three other categories of cable channels: Class II channels, which are used for the delivery of unscrambled, non-broadcast cable services such as Cable News Network, ESPN, and various local origination and public access services; Class III channels, which are used for the delivery of encoded nonbroadcast cable services that can be received only with a separate decoding device; and Class IV channels, which are used for two-way interactive services. 47 C.F.R. §§ 76.5(u)-(w). The Commission in 1972 expressly decided not to establish any specific technical standards for channels in Classes II, III, and IV. *Cable Television Report and Order*, 36 F.C.C.2d at 200.

[5] *See, e.g.*, 47 C.F.R. §§ 76.605(a)(1)-(5), (7). These compatibility standards indirectly relate to signal quality since the delivery of signals that do not meet these specifications is likely to cause degradation of the audio and/or video components of the material received on the subscriber's set.

directly dealt with the quality of the picture received at the subscriber's set by setting limits on the amount of noise or distortion that a cable signal could contain.[6] And one standard established limits on signal leakage and was directed primarily at minimizing the risk of interference from cable systems to other radio services (e.g., amateur radio, aeronautical communications, over-the-air broadcast television) that use the same frequencies.[7]

In establishing cable television technical standards, the Commission declined to adopt standards specifying the optimum level of possible performance; instead the Commission promulgated so-called "minimum" standards that defined an acceptable level of performance at the worst subscriber location.[8] The decision to adopt this "minimum" standards approach reflected the facts that the quality of a cable signal tends to deteriorate as the electromagnetic wave moves farther and farther from its point of origination and that achieving the optimum level of performance throughout a cable system may be economically impracticable.[9] It also reflected the Commis-

[6] *See, e.g.*, 47 C.F.R. §§ 76.605(a)(6), (8)-(10).

[7] 47 C.F.R. § 76.605(a)(11).

[8] *See Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 472 (1972). *See also Notice of Proposed Rule Making in Docket No. 18894*, 25 F.C.C.2d 38, 42 (1970). As the Commission subsequently explained, the characterization of its technical standards as "minimum" standards was not intended to suggest that the standards were in any way inadequate or inferior. *Report and Order in Docket No. 20018*, 49 F.C.C.2d at 472. Indeed, it was the Commission's expectation that a system which was meeting the "minimum" standards at its worst subscriber location would necessarily be exceeding those standards at all other locations. *Id.*

[9] *See, e.g., Cable Television Report and Order*, 36 F.C.C.2d at 200 (stating that costs involved in measuring performance were considered in drawing specific technical standards). *See also Report and Order in Docket No. 20018*, 49 F.C.C.2d at 479. In one instance, the Commission, while acknowledging that a proposal for a more

sion's recognition that regulation of technical performance has to be flexible in order to facilitate continued technological innovation.[10]

The Commission stated that one of its goals in adopting a set of minimum technical standards for the cable industry was to bring "much needed" national uniformity to the regulation of cable technical performance.[11] Nevertheless, the agency initially rejected suggestions that it preempt state and local regulation of cable television technical standards.[12] Instead, the Commission specifically permitted franchising authorities to adopt "more stringent" technical standards than those in the Commission's rules.[13]

This approach, however, was short-lived. During the next two years it quickly became apparent that the Commission's policy of shared jurisdiction was not working and that there was, in the Commission's words, a "compelling need" for national uniformity in the promulgation of cable television technical regulations.[14] There-

stringent frequency stability tolerance had technical merit, nonetheless rejected it on the grounds that the necessary equipment to meet the higher standard was not available in sufficient quantities or at a reasonable cost. *Reconsideration of Cable Television Report and Order*, 36 F.C.C.2d at 361.

[10] *Cable Television Report and Order*, 36 F.C.C.2d at 198. Indeed, acknowledging the importance of maximizing regulatory flexibility, the Commission included in its rules a specific provision that excused cable operators from meeting its technical standards where the basic design of the system made compliance impossible and where it could be shown that the public would benefit from the system's design. 47 C.F.R. § 76.605(b). *See also Notice of Proposed Rulemaking in Docket No. 18894*, 25 F.C.C.2d at 43.

[11] *Cable Television Report and Order*, 36 F.C.C.2d at 198.

[12] *Reconsideration of Cable Television Report and Order*, 36 F.C.C.2d at 359-60.

[13] *Id.*

[14] *Report and Order in Docket No. 20018*, 49 F.C.C.2d at 477.

fore, in 1974, the Commission announced that it was preempting the authority of state and local officials to establish cable television standards that were either more stringent than or in addition to those established by the Commission.[15]

In explaining its decision to preempt state and local authority over technical standards, the Commission noted that while cable television was a localized service in many respects, the industry as a whole had evolved into an "integral link" in the nationwide communications network.[16] Emphasizing that "electromagnetic signals do not change their characteristics according to political boundaries," [17] the Commission expressed concern that the unfettered exercise of jurisdiction over cable technical standards by state and local officials was threatening to interfere with the interstate system of communications. For example, the Commission noted that, in some cases, franchising authorities had used their concurrent jurisdiction over technical standards to impose "clearly unworkable or impossibly excessive demands" on cable operators.[18] More significantly, the Commission found that the burden of "having to manufacture specialized equipment based on jurisdictionally imposed standards" was likely to impede the development and marketing of innovative technologies and would unnecessarily increase the cost of cable service to consumers.[19]

Based on these conclusions, and on its unsatisfactory experience with a shared jurisdictional approach, the Commission decided that the federal government had to take a preeminent role in the development of cable tele-

[15] *Id.*

[16] *Id.* at 478.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 479.

vision technical standards.[20] The Commission, however, did not completely expel state and local governments from the field of technical standards. Even as it was announcing its "broad" preemption policy, the Commission stated that nonfederal officials would remain free to enforce technical standards modelled on those adopted by the Commission.[21] In addition, the Commission indicated that waivers of its preemption policy would be available where it could be shown that such action was warranted "both from a technical and a socio-economic standpoint." [22]

Over the course of the next decade, the Commission frequently reaffirmed and applied its policy of preempting state and local technical standards where those standards differed from the Commission's standards.[23] During this same period, the cable television industry continued to make great strides technologically. The development of satellite technology in particular fueled the growth of cable television programming services. In addition, improvements in equipment made it possible for systems to

[20] *Id.*

[21] *Id.* at 480.

[22] *Id.* at 479-80. The Commission also grandfathered existing state and local technical standards and reaffirmed that federal preemption only extended to rules concerning the "shaping, amplification, purity, etc." of the signals carried on cable systems, *id.* at 471, and did not apply to

> "mechanical or equipment standards designed to protect, for example, against extraordinarily corrosive environments, daily or seasonal temperature extremes, high winds, or rodent attack. Nor are we more directly concerned with the channel capacity of a system, protection against electrical supply outages, the placement of structures, construction practices, or electrical safety code enforcement." *Id.* at 472.

[23] *See, e.g., Sequoia Cablevision,* 36 Rad.Reg.2d (P&F) 982 (1976); *Pittman, Lovett, Ford & Hennessey,* 37 Rad.Reg.2d (P&F) 429 (1976); *Silver King Video,* 35 Rad.Reg.2d (P&F) 1427 (1975).

greatly increase the number of channels provided and to develop new uses for those channels.[24]

In order to facilitate these technological improvements, and consistent with its policy of maximizing regulatory flexibility, the Commission from time to time adopted modifications to its existing technical standards to make them *less* stringent. For example, in 1977, the Commission relaxed several of its original technical standards upon showings that they created unnecessary burdens for the cable industry.[25] Similarly, in 1982, the Commission granted a blanket waiver of its aural carrier frequency separation standard (which is designed to ensure that the audio portion of the cable signal is within a tolerance that can be picked up by the subscriber's television set); the waiver permitted the use of the newly developed "baseband" converter technology which, while incapable of meeting the Commission's existing aural carrier frequently separation standard, offered previously unavailable benefits to cable subscribers without degrading the quality of the signals provided.[26]

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[24] Other technological innovations occurring over the past decade include stereo reception capability, "addressable" converters that allow subscirbers to select various programming options without the expense or inconvenience of a service call by the cable operator, and new methods of offering interactive, two-way communications.

[25] *Report and Order in Docket No. 20765*, 64 F.C.C.2d 743 (1977). *See also Cable Television Service Rules*, 39 Rad.Reg.2d (P&F) 100 (1976) (relaxing standard for amplitude characteristic of cable signals to alleviate conflict between existing standard and operations of certain types of cable equipment).

[26] *Viacom Cablevision of Wisconsin, Inc.*, 50 Rad.Reg.2d (P&F) 1558 (1982). The terms of this blanket waiver ultimately were incorporated into the Commission's rules as an amendment to the technical standards adopted in the course of the proceeding to which the instant case relates. *See Report and Order in MM Docket No. 85-38*, 102 F.C.C.2d 1372, 1379 (1985) (Pet. App. 76-78). *See also Teleprompter Cable Communications Corp.*, 49 Rad.Reg.2d (P&F) 1616 (1981) (waiving frequency boundary requirement to permit use of a new channelization scheme which was designed to reduce distortion in delivery of cable signals).

Finally, in 1985, the Commission proposed a partial restructuring of its regulatory approach with respect to the regulation of cable television technical standards. *Notice of Proposed Rulemaking in MM Docket No. 85-38*, 50 Fed. Reg. 7801 (1985) ("NPRM") (J.A. 2-25).[27] Under this proposal, the Commission, as in the past, would continue to act as a national standards-setting body for cable television technical criteria; and, as in the past, state and local officials would be permitted to enforce standards modelled on the Commission's standards, but would be barred from adopting any technical standards different than the standards promulgated by the Commission. NPRM ¶¶ 10-11 (J.A. 12-14).[28] However, in a departure from its prior regulatory approach, the Commission indicated that it would leave the decision whether to enforce its standards entirely in the hands of the franchising authorities and would no longer require compliance with any standards governing signal quality as a matter of *federal* law. *Id.*[29]

After considering comments from a wide range of interests, the Commission adopted the proposal with minor

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[27] Numbers in parentheses preceeded by "J.A." refer to pages in the Joint Appendix. Numbers in parentheses preceeded by "Pet. App." refer to pages in the Appendix to the Petition.

[28] The Commission did not propose to make any substantive changes in its standards as part of this proceeding. However, it indicated a willingness to consider modifications of its standards in a separate proceeding upon an adequate showing that such changes would be in the public interest. NPRM ¶ 14 (J.A. 14).

[29] The Commission's proposal distinguished the signal leakage standard, which relates to interference, from the other technical standards, which directly or indirectly regulate the quality of the pictures and sound received by the subscriber's television set. *See* pages 3-4 *supra*. With respect to the former, the Commission proposed to continue federal enforcement of limits on signal leakage, but to modify the existing limits to make them less stringent. *Notice of Proposed Rulemaking in MM Docket No. 85-38* at ¶¶ 12-16, 50 Fed. Reg. at 7802-03.

modifications. *Report and Order in MM Docket No. 85-38*, 102 F.C.C. 1372 (1985). The Commission explained that because of competitive pressures from other video services, neither the cessation of federal enforcement activity regarding cable television technical performance nor the continued preemption of state and local technical standards in excess of those promulgated by the Commission would threaten the quality of service received by the public; in fact, in the Commission's view, subscribers would benefit from the increased flexibility of the cable industry to respond to technological innovation and marketplace developments. *Id.* at 1376-78 (Pet. App. 61-68). Citing the example of its blanket waiver permitting the introduction of baseband technology, the Commission noted that the suppliers of the equipment utilized by cable operators operate in a "national market" and that adoption of disparate nonfederal technical requirements would "create potentially serious negative consequences for cable system operators and cable consumers in terms of cost of service and the ability of the industry to respond to technological changes." *Id.* at 1377-78 (Pet. App. 66-72). As for the jurisdictional issue, the Commission rejected claims that it lacked the authority to preempt more stringent state and local technical standards, concluding that Section 624(e) of the recently-passed Cable Act anticipated continuation of the existing policy and that the reasons for preempting more stringent state and local technical standards "appear to be as valid today as they were when the policy was first adopted" in 1974. *Id.* at 1378-80 (Pet. App. 68-75).

2. Following the release of the *Report and Order in MM Docket No. 85-38*, several cities and organizations representing cities (the "Cities") filed suit in the United States Court of Appeals for the District of Columbia Circuit challenging the Commission's action. The Cities argued that, under the Cable Act, the Commission lacked the requisite statutory authority to set a ceiling on state

and local technical standards.[30] The Court of Appeals affirmed the Commission's action insofar as it related to Class I cable channels. *City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987).[31]

The Court of Appeals first noted the long history of federal preemption of local technical standards, regarding that history as a "backdrop" for examining the provisions of the Cable Act. 814 F.2d at 722-23 (Pet. App. 7-10). Then, reviewing both the language of the Act and its legislative history, the court found "no provision that expressly terminates this longstanding preemption policy" and no "specific indications that Congress disapproved of the FCC's policy." 814 F.2d at 724. (Pet. App. 17-18). Indeed, the court noted, the relevant House Report had cited decisions upholding the Commission's preemption policy—including this Court's decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)—"without any indication of disapproval." *Id.*

The Court of Appeals then turned to two specific provisions of the Cable Act relating to technical standards: Section 624(e), which gives the Commission authority "to establish technical standards relating to the facilities and equipment of cable systems," and Section 624(a), which provides that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter." 47 U.S.C. §§ 544(a), (e). Reading these sections together with the legislative history, the court found no congressional intent to circumscribe the Commission's authority to regulate with regard to tech-

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[30] The Cities also argued that the regulations were arbitrary and capricious. That argument was rejected by the Court of Appeals and is not directly made here. *But see* pages 31-32 *infra*.

[31] The Cities also challenged the Commission's decision to continue its longstanding policy of totally precluding regulation of the technical performance of Class II, III, and IV channels. *See* note 4 *supra*. The Court of Appeals remanded to the Commission the portion of the case relating to non-Class I signals. That aspect of the court's decision is not at issue here.

nical standards. 814 F.2d at 725 (Pet. App. 20-21). The court thus held that "[t]he FCC's decision to preempt franchisors' technical regulations with its own Class I technical standards, minimal though they may be, cannot be said to exceed its statutorily delegated preemption authority . . . ." 814 F.2d at 726 (Pet. App. 26). The court concluded that the Commission's "broad authority allows the Commission to decide, as it did in this case, that a certain level of regulation is *all* that is desirable." *Id.* (emphasis in original).

Judge Mikva dissented from this part of the court's holding. In his view, the majority should have "conduct[ed] a rigorous examination of whether Congress has unmistakably ordained preemption." 814 F.2d at 729 (Pet. App. 39). Though recognizing that "Congress of course may delegate to any agency the power to issue certain preemptive regulations," Judge Mikva stated that it must "do[] so in no uncertain terms." 814 F.2d at 729 (Pet. App. 41). In the end, however, he concluded that the Commission's regulations "do[] not hold up to even deferential scrutiny." 814 F.2d at 730 (Pet. App. 44). Citing language in the House Report, Judge Mikva stated that the "Commission interpretation . . . flatly contradicts the relevant legislative history." 814 F.2d at 730-31 (Pet. App. 44-46, 48).

After unsuccessfully seeking rehearing *en banc* by the Court of Appeals, the Cities filed a Petition for a Writ of Certiorari on August 25, 1987. This Court granted the Writ of Certiorari on November 30, 1987.

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case, while touching on issues of federal preemption, is basically one of straightforward statutory construction. In Section 624(e) of the Cable Act, 47 U.S.C. § 544(e), Congress explicitly conferred on the Federal Communications Commission the authority to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." At the same time,

Congress further stated that "[a]ny franchising authority may *not* regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter." Cable Act § 624(a), 47 U.S.C. § 544(a) (emphasis added). Acting pursuant to these sections, the Commission determined, first, that it would provide minimum technical standards for franchising bodies to require in franchises (if they so desired) and, second, that it would allow more advanced standards to develop through industry experience rather than through extensive, and perhaps inconsistent, local regulation. The Commission thus expressly preempted more severe local standards. In so doing, the Commission noted that its prior policy of allowing such local standards had proved harmful to development of cable television—leading to a reversal of that policy in 1974—and that the same potential problems posed by the adoption of unrealistic or widely divergent standards still existed.

There is no question that regulations promulgated by a federal agency may preempt state or local laws. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2375 (1985). Whether they do so, in fact, is determined by examining both the agency's intent and the extent of its statutory authority. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). If an agency reveals a clear intent to preempt state or local laws, and if that judgment is within the scope of its statutory authority, the regulations are binding on state and local governments under the Supremacy Clause. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. at 2375. Despite petitioners' arguments to the contrary, the Commission's regulations plainly meet this standard.

1. The Commission's intent to preempt more stringent technical standards cannot be seriously disputed. To

begin with, the regulations themselves flatly state that "[n]o technical parameter in excess of the [federal parameters] may be required." The accompanying discussion drives home the point, noting the Commission's continuing concern about "disparate and conflicting local regulations and standards" and about their possible "detrimental impact . . . on technological innovation in the industry." Unlike the typical preemption case relied on by petitioners, therefore, there is in this case a manifest federal policy requiring the preemption of additional local regulations.

2. The regulations are also well within the boundaries of the Commission's statutory authority. Section 624(e) of the Cable Act contains a specific grant of authority for the Commission to "establish technical standards relating to the facilities and equipment of cable systems." By any recognized standard of statutory construction, that grant is roomy enough to give the Commission discretion to adopt the federal policy reflected in its regulations—including the policy that some aspects of technical standards should remain unregulated. *See generally FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Furthermore, Congress has provided in Section 624(a) of the Act that local authorities "may not regulate" with respect to facilities and equipment except to the extent consistent with other provisions of the Act. Those words of limitation clearly do not permit state and local officials to disregard federal regulations issued pursuant to a grant of authority in that very section.

Petitioners argue, however, that the Commission's prohibition of more stringent standards prevents them from carrying out certain duties under other provisions of the Act. But if petitioners are dissatisfied with the present standards, and believe that more stringent standards would be appropriate, their proper course is to seek a revision of the standards. What they may not do is simply substitute their own standards in disregard of a contrary federal policy.

ARGUMENT

This case involves the validity of regulations, promulgated by the Federal Communications Commission, relating to technical standards for facilities and equipment used by cable television systems. The regulations allow local franchising authorities to impose specified "minimum" standards but not to impose more stringent standards. This policy of partial preemption was first established by the Commission more than a decade ago, after it had found an earlier policy of permitting additional local regulation to be unsatisfactory. Then, as now, the Commission concluded that a wide variety of potentially conflicting local standards threatened to inflate the cost of cable service and stifle the potential for technological innovation.

Petitioners, in now attacking the Commission's regulations, have essentially one argument to make: that the Cable Act prohibited the Commission from preempting additional technical standards. But Section 624 plainly gives the Commission primary authority to regulate with regard to technical standards and, by limiting local franchising bodies to "consistent" actions, necessarily confers preemptive authority as well. Because Congress clearly did not intend to foreclose *all* preemptive regulations, the real argument here must be that Congress somehow meant to bar *these* preemptive regulations. Yet, petitioners cite not a single word, in the text of the statute or its legislative history, to indicate that Congress sought to force the Commission to abandon its longstanding policy in favor of another (*i.e.*, permitting more stringent local standards) that it had already tried and found unworkable.

The framework for analyzing these issues is well-established. Although the focus of preemption analysis may vary depending on the sort of preemption asserted,

this Court has set forth a basic two-part test for determining whether agency regulations validly preempt state law. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (*Fidelity Federal*). The first question is whether the agency—in this case, of course, the Commission—"meant to pre-empt" state law; the second is whether, if so, "that action is within the scope of the [agency's] delegated authority." *Id.* at 154. If the answer to both questions is yes, as we submit it is here, then the regulations are valid and "have no less preemptive effect than federal statutes." *Id.* at 153; *see Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

I. The Commission's Regulations Are Unmistakably Intended To Preempt State Law.

The first part of the *Fidelity Federal* test is easily satisfied in this case. We know that the Commission's regulations regarding technical standards are meant to preempt more stringent local standards because the Commission said so:

> "NOTE.—The requirements of §§ 76.605(a)(1) through 76.605 (a)(10) [the Commission's signal quality standards] do not apply directly to cable systems. These rule sections or less stringent versions of them may be used as standards by state or local regulatory authorities. *No technical parameter in excess of the above rule sections may be required.*" (Emphasis added). 47 C.F.R. § 76.605 (Note) (Pet. App. 87).

This statement, in fact, not only makes clear the Commission's intent to preempt local regulation, but defines the nature and extent of that preemption.

If the regulations themselves left any doubt, the discussion accompanying their adoption would resolve it.

Noting its prior policy of establishing "guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations," *Report and Order in MM Docket No. 58-38*, 102 F.C.C.2d at 1378 (Pet. App. 66-67), the Commission found that "[t]he reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted." *Id.* (Pet. App. 68). The Commission pointed out that the products sold by cable systems and the equipment used in their construction "are overwhelmingly associated with national markets that can be seriously burdened by disparate and conflicting local regulations and standards." *Id.* (Pet. App. 69). These standards not only would lead to additional costs for individual cable systems, and ultimately for consumers, but would have a potential "detrimental impact . . . on technological innovation in the industry." *Id.* at 1374 (Pet. App. 56). The Commission, after reviewing the arguments pro and con, concluded that its "existing preemption policy has furthered the growth and development of cable television service and should be continued . . . ." *Id.* at 1380 (Pet. App. 74).

This unequivocal evidence of federal policy as expressed by the Commission, sets this case apart from many, if not most, preemption cases. This Court has long recognized the basic principle that the Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to' federal law." *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985) (*Hillsborough County*), *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1,209 (1824). And, as we have noted, the Court has held that "state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County, supra*, 105 S. Ct. at 2375; *Capital Cities Cable v. Crisp, supra*, 467 U.S. at 699; *United States v. Shimer*, 367 U.S. 374, 381-83 (1961).

The difficulty in the usual preemption case thus does not arise out of any uncertainty about whether state or federal law should prevail; it arises from the need to decide whether there is, in fact, any federal law that state laws genuinely "interfere with or are contrary to."

When the evidence of federal intent to preempt state law is ambiguous, this Court has shown a natural reluctance to assume such intent. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1427 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981). To begin with, it is reasonable to think that Congress and federal agencies do not routinely intend to displace state law, particularly when they do not bother to say so. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Furthermore, absent clear statements regarding preemption, a court must venture into relatively speculative inquiries about whether (and how much) the federal government meant to occupy a field or whether, as a practical matter, the state law interferes with a general federal policy. *See generally California Coastal Comm'n v. Granite Rock Co., supra; Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941). If preemption is too lightly found, the result is likely to be that the regulated entity escapes the force of state law despite the absence of any real federal policy requiring that result, and perhaps even contrary to what the federal government actually would favor.

These circumstances simply are not present here. Not only has the Commission spoken clearly on the very issue presented, but it has carefully explained its reasons for finding that additional state regulation would interfere with federal policy. Moreover, unlike the situation

in many preemption cases before this Court, the agency is actually present as a party reaffirming and defending its policy. Given the clarity of the agency's position regarding preemption, there can be no doubt that additional local standards would be flatly contrary to federal law. The only issue, therefore, is whether that federal law is invalid—*i.e.*, whether the Commission, in promulgating its regulations, went beyond its statutory authority. As we discuss in the following section, it plainly did not.

II. The Commission's Decision To Prohibit More Stringent Technical Standards Was Within the Commission's Statutory Authority Under the Cable Act.

A. The Cable Act Confers Broad Discretionary Authority on the Commission To Adopt Regulations Relating to Technical Standards.

As both the Commission and the court below recognized, the Cable Act expressly confers authority on the Commission to adopt regulations concerning cable television technical performance. Specifically, Section 624(e) of the Act provides that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in a franchise." On its face, this provision, which contains the only explicit reference to the regulation of technical matters found in the Cable Act, broadly delegates to the Commission discretionary standards-setting authority.

This Court has frequently held that an agency, acting purusant to grant of discretion such as that found in Section 624(e), is accorded wide latitude in deciding how to implement its statutory authority. *See Batterton v. Francis*, 432 U.S. 416 (1977); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837

(1984). Moreover, regulations adopted by an agency in the exercise of its discretionary authority to set standards are given "legislative effect" and are not lightly set aside by the courts. *Batterton v. Francis, supra,* 432 U.S. at 425; *Rowan Companies, Inc. v. United States,* 452 U.S. 247, 253 (1981) (greater deference given when agency issues regulation "under a specific grant of authority"). Thus, under established principles of construction, the authority conferred on the Commission by Section 624(e) necessarily includes not only the power to adopt particular technical performance requirements, but also the power to decide that no other requirements, federal, state, or local, should be adopted. *See FCC v. WNCN Listeners Guild, supra,* 450 U.S. at 603 (upholding FCC policy "relying on market forces" rather than regulatory oversight); *see also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 384 (1983) (a "federal decision to forego regulation in a given area may imply an authorative federal determination that the area is best left *un*regulated and in that event would have as much preemptive force as a decision *to* regulate") (emphasis in original).[32]

Petitioners try to muddle the proper inquiry by arguing that, notwithstanding its unrestricted authority to

[32] There is thus no merit to petitioners' argument that the word "standards" must be read as a limitation on the Commission's authority to decide that national policy would best be served by allowing the cable industry, rather than federal or local regulators, to develop more advanced technological specifications for facilities and equipment. In *Batterton v. Francis,* for example, this Court upheld regulations, issued pursuant to a statute providing for "standards prescribed by the Secretary [of HEW]," that nonetheless left to the states some discretion over the content of particular standards. 432 U.S. at 426-432. Noting that "Congress . . . expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' . . . ," *id.* at 425 (emphasis in original), the Court stated: "In a situation such as this, Congress entrusts the Secretary, rather than to the courts, the primary responsibility in interpreting the statutory term." *Id.*

establish technical standards, the Commission cannot prohibit more stringent standards without a "clear manifestation of Congressional intent to preempt." Pet. Brief at 14. This Court, however, rejected just this sort of approach in *Fidelity Federal.* There, remarking that a "narrow focus on Congress' intent to supersede state law was misdirected," *Fidelity Federal, supra,* 458 U.S. at 154,[33] the Court held that "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Id., citing United States v. Shimer,* 367 U.S. 374, 381-83 (1961). The Court went on to state that "[w]hen the administrator promulgates regulations intended to pre-empt state law," the nature of judicial inquiry is "similarly limited": "If [h]is choice represents a reasonable accomodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accomodation is not one that Congress would have sanctioned." *Id.*[34]

[33] In many preemption cases, of course, the inquiry must focus solely on congressional intent to preempt because there is no other evidence of federal policy (for example, agency regulations) to look at. In other cases, a claim may be made that Congress intended to preempt local regulation even though the agency carrying out federal policy has not itself preempted such regulation. *See, e.g., California Coastal Comm'n v. Granite Rock Co., supra; R.J. Reynolds Tobacco Co. v. Durham County,* 107 S. Ct. 499 (1986). Neither situation pertains here.

[34] The Court took a similar position in *Capital Cities Cable, Inc. v. Crisp,* stating: "[I]f the FCC has resolved to preempt an area of cable television regulation and if this determination 'represents a reasonable accomodation of conflicting policies that are within the agency's domain,' *United States v. Shimer, supra,* 367 U.S. at 383, we must conclude that all conflicting state regulations have been precluded." 467 U.S. at 700. In that case, the Court found sufficiently broad authority to preempt state regulation in the Commission's general powers under the Communications Act of 1934,

It is difficult, in fact, to see how the prevailing rule could be any different without severely limiting Congress' power to delegate rulemaking authority to a federal agency. As this Court has long recognized, the power of delegation allows Congress to commit various policy judgments to agencies with specialized knowledge and expertise over the subject matter at issue. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940). Congress cannot always be expected to know in advance whether the particular policy established by a federal agency will or will not require some displacement of state and local regulation; and it would be a pointless formalism to require Congress to say in every statute delegating authority to a federal agency that the agency can preempt state law if such law would interfere with federal policy. When Congress wants to give plenary regulatory power to state and local authorities, even though such power would override any contrary policy of a federal agency, it can readily find the words to do so. *See, e.g., Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890 (1986); *see* pages 27-28 *infra*. But, as a general matter, this Court should not presume that a grant of authority to a federal agency allows the agency only to set such federal policy as can coexist with any and all imaginable state laws.

In any event, however, this case does not present a situation in which Congress delegated regulatory authority without awareness that its exercise might involve preemption of contrary local regulations. Congress spoke directly to the subject, making clear that local regulators did not have unrestricted authority. Thus, in Section 624(a) of the Act, Congress expressly declared that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [the Act]." Furthermore, the House Report accompanying the Act

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47 U.S.C. § 152(a), a far less specific grant of authority than that found in Section 624(e) of the Cable Act.

explains that the authority of state and local governments regarding technical regulation is limited to the establishment of facilities and equipment "which are not inconsistent with standards established by the FCC." H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 70. Together, these statements provide strong evidence that Congress did not intend local governments to exercise regulatory authority that would place them in direct violation of regulations promulgated by the Commission pursuant to the same section of the Act.

Petitioners argue, however, that Congress, by its references to "consistent" or "not inconsistent" regulation, meant to allow state and local officials to impose more stringent standards. This theory is wholly unpersuasive. Although Congress clearly gave the Commission the authority to permit more stringent local standards, Section 624(a) can hardly be read as a command to do so. Indeed, it is plain that, even under petitioners' reading of the Act, the Commission could have preempted more stringent standards simply by requiring that facilities and equipment meet (and not vary from) a set of fixed standards rather than a set of minimum requirements or tolerances. In that case, any franchising body requiring adherence to different standards—including more stringent ones—would unquestionably be exercising authority "inconsistent with standards established by the FCC." Given that Congress gave the Commission authority to preempt more stringent standards by one type of regulation, it seems wholly illogical to say that Congress somehow meant to prohibit the Commission from adopting a different regulatory policy that has no greater preemptive effect.

The state of the law prior to the Cable Act makes it even more unlikely that Congress had any such unusual intention. As indicated above, between 1972 and 1974, the Commission first tried and then abandoned a policy of shared jurisdiction with respect to the establishment

of technical regulations. The shared jurisdiction policy was deemed a failure by the Commission because it threatened to frustrate the basic objectives underlying the Commission's "minimum" standards regulatory approach, including the promotion of technical innovation and low-cost cable service. In its place, the Commission adopted, and for many years followed, a policy of preemption. What petitioners now contend, in essence, is that Congress has mandated a return to the failed shared jurisdiction approach and barred the Commission from continuing its longstanding preemptive policy. As the Court of Appeals correctly noted, nothing in the Cable Act itself, express or implied, suggests that Congress intended so to constrain the Commission's discretion, nor should such a reversal of prior policy be lightly inferred. *City of New York v. FCC*, *supra*, 814 F.2d at 726 (Pet. App. 25).[35]

This Court should be especially reluctant to find that Congress intended to preclude the Commission from preempting more stringent state and local technical regulations in light of the fact that the Commission's policy effectuates one of the basic objectives of the Cable Act—

[35] *See also Peerless Casualty Co. v. United States*, 344 F.2d 495, 496 (D.C. Cir. 1964) (Congress is not assumed to change existing law unless the intent to do so is "clearly and indubitably" manifested). Petitioners contend that the court below erred in "presuming" that Congress intended to "codify" the existing preemption policy, suggesting that the Cable Act was designed to "replace" the pre-Act regulatory structure. Pet. Brief at 22-23. In fact, however, it is not necessary to find, nor has it been suggested, that Congress "codified" the Commission's preemption policy. Rather, what Congress "codified" was only the Commission's discretionary authority to adopt such a policy. Furthermore, contrary to petitioners' assertions, Congress' objective in adopting the Cable Act was not to discard the existing division of authority among federal, state, and local officials, but merely to "clarify" the scope of their respective powers. *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 19.

minimizing unnecessary regulation.[36] Indeed, there is evidence that Congress was specifically aware of and concerned about the "state-of-the-art" mentality of many franchising authorities.[37] The problems posed by the unrestrained exercise of state and local regulatory authority concerning cable television technical matters include not only the imposition of burdensome and occasionally unworkable standards, but also the adoption of varying requirements that impede technological innovation.[38] For example, even if the particular standards adopted by state or local governments are all "reasonable" from an engineering standpoint, the absence of a single national arbiter of technical standards will inhibit the development of new technologies and services.[39] There also is the risk that, as a

[36] Cable Act § 601(6), 47 U.S.C. § 521(6). *See also Report and Order in MM Docket No. 85-38*, 102 F.C.C.2d at 1379 (Pet. App. 71-72).

[37] *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 21.

[38] The rulemaking record compiled by the Commission in deciding to continue its preemption approach confirms the validity of Congress' concern about "state-of-the-art" expectations. For example, comments submitted on behalf of cable operators established that it was not unusual for franchising authorities to insist on compliance with extraordinarily detailed technical specifications going far beyond the Commission's standards. *See, e.g.*, Appendix to Comments of Capital Cities Cable, Inc. in MM Docket No. 85-38 (filed March 29, 1985) (J.A. 75-101). In some cases, compliance with these "more stringent" technical standards actually could have a *negative* impact on the quality of the service provided. *See, e.g.*, Appendix to Reply Comments of Harron Communications Corp., TeleCable Corp., and Tribune Cable Communications, Inc. in MM Docket No. 85-38 (filed May 15, 1985) (J.A. 103-109).

[39] The development of baseband converter technology, *see* page 8 *supra*, demonstrates the importance of having a single standards-setting body. In order to make the benefits of this new technology available to the public, the Commission had to waive one of its then-existing technical standards. As the Commission has noted, baseband technology probably would never have been developed if its introduction in the market had been dependent not on a single waiver from the Commission, but on separate waivers from thou-

practical matter, the standards adopted by franchising authorities in large cities such as New York would become *de facto* industry standards. If these standards were more stringent than the Commission's requirements, they might limit the availability of low cost service options to smaller, less affluent communities. Even more significantly, the standards adopted by state and local governments might also impede the Commission's ability to integrate cable technology into a nationwide system of communications.[40]

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sands of franchising authorities. *Report and Order in MM Docket No. 85-38*, 102 F.C.C.2d at 1379 (Pet. App. 70-72). The development of baseband converter technology also belies the assertion, made by *amici curiae* Montgomery County, Maryland and St. Louis, Missouri, that divergent nonfederal technical standards will not deter the development of new products because such standards are directed at performance, not design. In fact, design innovations typically are made in an effort to improve performance. As the baseband example demonstrates, in some cases the sought-after improvement in performance only can be achieved in a way that creates a conflict with existing technical standards.

[40] For example, the Commission currently is overseeing a comprehensive inter-industry, inter-agency inquiry into the development of high definition television (HDTV). *See generally* "Blue Ribboners Go To Work on TV's Future," *Broadcasting*, Nov. 23, 1987, pp. 35-39. The scope of this inquiry reflects the fact that the concerns of the various industries interested in this emerging technology—including cable television, broadcasting, other potential users of radio spectrum, program producers, and consumer equipment manufacturers—increasingly are interrelated. Pending completion of the inquiry, the Commission has deferred adopting any standards for HDTV. If state and local officials, focusing only on their own particular needs and interests, are free to fill the current regulatory void by adopting cable-specific HDTV requirements, they likely will interfere with the ongoing national effort to implement HDTV in a manner that considers and balances the needs and interests of *all* of the effected industries, and of the public in general.

B. Petitioners' Arguments Fail To Provide Any Evidence That Congress Intended To Limit the Commission's Authority To Adopt a Regulation Prohibiting State and Local Officials From Establishing Technical Standards More Stringent Than Those Established By the Commission.

As demonstrated above, the broad discretion over the establishment of technical standards delegated to the Commission by Section 624(e) of the Cable Act reasonably must include not only the power to decide whether to adopt (or not to adopt) a particular standard, but also the power to make necessary policy judgments and to restrain state and local officials from adopting regulations that would contradict those judgments. Indeed, a construction of Section 624(e) that permits state and local officials to ignore, impede, or interfere with the policy determinations underlying the Commission's exercise of its authority to set technical standards would essentially render that delegation of authority meaningless.

Petitioners nonetheless contend that Congress, in Section 624(b) of the Cable Act, 47 U.S.C. § 544(b), intended to grant state and local governments an irreducible degree of authority over technical standards. The first and most obvious problem with this argument is that Section 624(b) must be read in conjunction with statutory language that, on its face, *limits* the authority of state and local governments in deference to the federal government. As we have pointed out, Section 624(a) expressly provides that a franchising authority "may not regulate" unless its regulation is consistent with the provisions of the Act, which include among their number the grant of authority to the Commission to establish technical standards. This language, which petitioners conspicuously ignore in their brief, hardly seems to confer broad authority on local franchising bodies to issue standards in direct conflict with Commission regulations.

The instant case is thus very different from *Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890 (1986), the case on which petitioners so vigorously rely. In *Louisiana Public Service Comm'n*, this Court held that the Commission could not use its general authority over communications policy to preempt state regulation where a provision of the Communications Act itself expressly denied the agency any jurisdiction over the particular subject matter at issue. Here, unlike the statutory provisions at issue in *Louisiana Public Service Comm'n*, the Cable Act does not "fence off" the area in question (regulation of cable television technical standards) from regulation by the Commission. To the contrary, it explicitly and unrestrictedly commits that area to the Commission's jurisdiction.

Petitioners also place great emphasis on the House Report statement indicating that Section 624(e) "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment . . . which are not inconsistent with standards established by the FCC under this subsection." H.R. Rep. No. 98-934, 98th Cong., 2d Sess. at 70. But this language, too, makes local regulatory authority secondary to federal authority, a ranking that fits naturally with the primary role given to the Commission in the area of technical standards. Moreover, while petitioners are certainly correct that a cable operator can physically comply both with the "minimum" federal standards and with more stringent local standards—and, thus, that more stringent standards are "not inconsistent" in one sense—that observation does not end the relevant inquiry. As this Court has held on numerous occasions, a preemptive conflict between federal and nonfederal law does not evaporate merely because it is physically possible to comply simultaneously with both the nonfederal and federal provisions, *Fidelity Federal, supra*, 458 U.S. at 153; state and local regulation also is incompatible with federally-imposed regulation

where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal rules. *Id., quoting Hines v. Davidowitz, supra*, 312 U.S. at 57.[41] Here, of course, the Commission has said openly that more stringent regulations are an obstacle to the policies of avoiding potentially disharmonious requirements and encouraging technological innovation.

Petitioners' reliance on other provisions in the Cable Act, each of which allows more stringent local regulation, is similarly off-base.[42] The point that petitioners seem to miss is that additional local regulation is sometimes consistent with federal policy, sometimes not, depending on the federal policy. Indeed, a comparison of the statutory provisions in question reveals that each of the provisions relied on by petitioners is phrased in terms indicating that Congress intended to confer expansive authority on state and local officials—language that is in marked contrast to the terms of limitation (*i.e.*, franchising authorities "may not regulate") used in

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[41] *See also Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 260 (1985). This principle is illustrated most clearly by one of the cases relied on by petitioners, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In *Jones*, this Court held that even though it was possible to comply with state law without triggering federal enforcement action, the state law nonetheless was preempted because it interfered with the accomplishment of the objectives underlying the federal law. *Id.* at 540-41.

[42] The provisions relied on by petitioners have nothing to do with the regulation of technical standards. *See* Cable Act § 634, 47 U.S.C. § 554 (relating to equal employment opportunity); Cable Act § 633, 47 U.S.C. § 553 (relating to theft of cable service); and Cable Act § 631, 47 U.S.C. § 551 (relating to subscriber privacy). All three sections address matters of particularly local concern. Regulation of cable television technical standards, on the other hand, directly affects technologies and markets that operate on a national scale. As the Commission has noted, "electro-magnetic signals do not change their characteristics according to political boundaries." *Report and Order in Docket No. 20018*, 49 F.C.C.2d at 478.

Section 624.[43] Additionally, each of the provisions cited by petitioners expresses an already defined and articulated set of federal objectives and policies, while Congress committed the task of establishing the national policy concerning cable standards to the Commission's discretion.

Petitioners' remaining arguments are equally without merit. Although Section 625 of the Cable Act, 47 U.S.C. § 545, concededly establishes a procedure for cable operators to obtain modifications of "commercially impracticable" franchise requirements, Congress gave no indication that it meant that provision to limit the powers delegated to the Commission under Section 624(e). Nor, in practical terms, does the existence of Section 625 mean that federal policy can be fully achieved without preemption. As its comments clearly show, the Commission's decision to preempt nonfederal technical standards was not based solely on its concern that state and local officials would adopt commercially unreasonable standards. It also reflected the Commission's fear that, given the existence of over 18,500 separate franchising bodies, even standards that were commercially reasonable might create hurdles to the growth of innovative services and equipment. *See Report and Order in MM Docket No.*

[43] *Compare* Cable Act § 631(g), 47 U.S.C. § 551(g) ("Nothing in the title shall be construed to prohibit any State or franchising authority from enacting or enforcing laws. . . ."); Cable Act § 633(c)(3)(D), 47 U.S.C. § 553(c)(3)(D) ("Nothing in this title shall prevent any State or franchising authority from enacting or enforcing laws. . . ."); Cable Act § 634(i)(1), 47 U.S.C. § 554(i)(1) ("Nothing in this Section shall affect the authority of any State or any franchising authority. . . .") *with* Cable Act § 624(a), 47 U.S.C. § 544(a) ("Any franchising authority may not regulate. . . ."). It also seems significant that, with respect to each of the provisions cited by petitioners, the House Report expressly declared that state and local officials were permitted to exceed federal law. Those statements strongly suggest that, whenever Congress intended to guarantee that state and local officials would be free to adopt more stringent regulations than those adopted by the federal government, it knew precisely how to express that intent.

85-38, 102 F.C.C.2d at 1378 (Pet. App. 69). The "commercial impracticability" provision has nothing to do with these concerns.[44]

Section 626 of the Act, 47 U.S.C. § 546, governing the franchise renewal process, likewise contains no evidence of congressional intent to limit the authority conferred on the Commission by Section 624. Although petitioners insist that they cannot carry out their responsibilities under Section 626 without more extensive technical standards—at least without resort to *ad hoc* determinations regarding signal quality—that argument seems directed more at the content of the "minimum" standards established by the Commission than at the statutory authority of the Commission to preempt additional standards. Because it hardly can be said that no set of federal standards would allow for a meaningful review of a cable system's technical performance, petitioners are reduced to complaining that the specific set of standards selected by the Commission is inadequate. But the power to preempt does not turn on whether state and local governments are satisfied with the particular federal regulations involved. If that were the case, then the federal government could enforce its own policies only when state and local governments had no different policy—the very reverse of traditional preemption analysis.

There is a clear difference between deciding whether a federal agency has the statutory authority to issue regu-

[44] *Amici curiae* Montgomery County, Maryland and St. Louis, Missouri point to several other provisions of the Cable Act as evidence of congressional intent to permit a wide range of state and local technical regulation. None of the provisions cited contains any reference to technical regulation. Nor is it necessary for state and local officials to establish their own technical standards in order to effectuate these provisions. Indeed, it seems strange that Congress would have expressly delegated authority over technical standards to the Commission if, as is alleged, the establishment of technical regulations by franchising authorities was considered an integral part of the powers accorded state and local officials under the Act.

lations and deciding whether the regulations themselves are arbitrary and capricious. If petitioners are dissatisfied with the current technical standards, they have available means of redress. In particular, they may file a petition for rulemaking proposing new or additional standards, or they may ask relief by way of individual waiver petitions. What they may not do, however, is unilaterally to adopt standards that exceed or otherwise depart from the standards deemed necessary and appropriate by the Commission as a matter of federal policy.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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REPLY

BRIEF

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No. 87-339

IN THE

Supreme Court of the United States

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR PETITIONERS

The FCC does not, as it repeatedly claims, have "plenary," "unrestricted" authority regarding cable technical standards. *See* FCC Br. at 12, 17, 19, 20, 24; NCTA Br. at 19, 27. To be sure, Section 624(e) of the Cable Act, 47 U.S.C. § 544(e), authorizes the Commission to "establish technical standards." But this provision does not exist in a vacuum. Unlike *Capital Cities Cable Co.* v. *Crisp*, 467 U.S. 691 (1984), and the other cases upon which the FCC and NCTA rely, Congress in the Cable Act also has vested local governments with certain rights and responsibilities in the area preempted by the FCC. And Congress has expressed *its* intent as to the proper accommodation of the competing grants of federal and local authority. Indeed, the purpose of the Cable Act was to delineate the boundaries within which the FCC, on the one hand, and state and local governments, on the other hand, may exercise regulatory authority over cable. Driven by its pre-Act deregulatory dogma, the Commission, however, has improperly refused to acknowledge, let alone respect, these Congressional boundaries.[1]

1. Contrary to the FCC's statement (FCC Br. at 12 n.5), the issues before this Court do include the FCC's preemption of Class II, III and IV standards; they are not limited to the FCC's Class I policy alone. The Court of

1. The Commission's Overly Broad Assessment of Its Preemption Authority Fails to Account for the Limitations Imposed by Section 626(c)(1)(B) of the Cable Act

Section 626(c)(1)(B) of the Cable Act, 47 U.S.C. § 546(c)(1)(B), requires franchising authorities to consider, in connection with possible franchise renewal, whether the cable system's

> signal quality . . . has been reasonable in light of community needs.

See Pet. Br. at 20-22. In the proceedings below, the Commission failed even to mention this provision. Now, it has sought to dismiss Section 626 with nothing more than an abbreviated footnote. The Commission contends that franchising authorities can evaluate signal quality "under the published standards, which the Commission has found will ensure that every cable subscriber will receive an acceptable quality of service . . . ." FCC Br. at 17-18 n.10.

The Commission, however, has no standards of any kind for Class II, III and IV channels.[2] It has no standards governing the vast majority of technical parameters which determine Class I signal quality. And it has never considered whether its Class I signal quality guidelines are adequate, or have any relevance at

Appeals reversed the FCC's preemption of Class II, III and IV standards only on the basis of a "failure to explain." Although no party has challenged this aspect of the Court of Appeals' decision, Petitioners are challenging that decision insofar as it accedes to the FCC's unlawful interpretation of the Cable Act. The essence of the FCC's position is that it has authority under the Cable Act to preempt all local standards for any signal class, with or without establishing any meaningful, competing standards of its own.

2. The FCC erroneously suggests that, "as a practical matter," Class I standards "may apply to all classes because all cable transmissions are carried over essentially the same equipment." FCC Br. at 12 n.5. While all transmissions ultimately may be carried over the same cable, they originate from a variety of different sources (*e.g.*, satellite, microwave, off-air, local studios) and are initially received and transmitted by a variety of different equipment. The transmissions themselves also represent a variety of inherent differences (*e.g.*, data transmissions, two-way transmissions, audio-only transmissions, video programming). Such differences mean that the Class I standards do not, as a practical matter, determine signal quality on Class II, III and IV channels.

all, for purposes of the renewal criteria of Section 626. Indeed, the entire focus of the FCC proceeding below was to ensure that determinations concerning the sufficiency of signal quality are made by the "marketplace" alone and not by franchising authorities—contrary to the very purpose of Section 626(c)(1)(B). *See* Pet. Br. at 7-9. To achieve that result, the Commission confined franchising authorities to the four 16-year old guidelines which it had previously and repeatedly found to be an "incomplete" "first step" in need of "augmentation" and "refinement" "as soon as possible." *See* authority cited in Pet. Br. at 6-7 & n.6.[3]

Furthermore, by seeking to limit a franchising authority's Section 626(c)(1)(B) inquiry to compliance with the FCC's Section 624(e) standards, the Commission has impermissibly rewritten the Cable Act. Section 624(e) only empowers the Commission to adopt "technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." Section 626(c)(1)(B), on the other hand, explicitly directs each franchising authority to consider whether its cable system's "signal quality" has been "reasonable in light of

3. In its original 1974 preemption order, which was reaffirmed below, the Commission specifically concluded that the proper "balance" would be achieved through a combination of preemption and

> the adoption of nationwide standards *more complete and refined than our present standards* . . . .

Report and Order in Docket No. 20018, 49 F.C.C.2d 470, 477 (1974) (emphasis added); *see also id.* at 472 and 478 (Commission standards are "conceded" to be "incomplete" in several important respects); *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket No.* 20018, 46 F.C.C.2d 175, 187 (1974) ("We repeatedly stated in the original cable rules and in the reconsideration of them that our technical standards were only a first step in what we expected would be a long process of refining the technical parameters of cable television"). The Commission established a special "task force" to study and to recommend the adoption of a complete set of standards which would form the basis of preemption. The Commission, however, never acted upon the recommendations of the task force. *See Report and Order in Docket No. 20765*, 64 F.C.C.2d 743, 750 (1977); ARC Engineering Statement (J.A. 42-43). Instead, in the order under review, the Commission concluded that the missing standards would be supplied by "marketplace forces." Report and Order ¶ 2 n.2 (Pet. App. 54).

community needs"—not whether that system has met the FCC's Section 624(e) "nationwide" standards for facilities and equipment. In contrast to the preceding Section 626(b) (which explicitly "subject[s] to Section 624" renewal proposals), Section 626(c) makes no reference whatsoever to Section 624 or to any role for the FCC; nor does Section 624(e) make any reference to Section 626(c).

During its consideration of the Cable Act, Congress refused to adopt a provision which would have confined the franchising authority's signal quality determination on renewal to whether the cable operator had "generally met technical standards as established by the Commission . . . ." *See* Pet. Br. at 22 n.16. The FCC's veiled effort to revive this provision is plainly improper.

2. The Commission's Overly Broad Assessment of Its Preemption Authority Fails to Account for the Limitations Imposed by Section 624(b) of the Cable Act

The Commission claims that "nothing in the Cable Act . . . permits local authorities to set technical standards of the type at issue in this case;" therefore, it has unfettered authority over such standards by virtue of Section 624(e). FCC Br. at 22, 16. But this claim is contrary to the language of Section 624(b) of the Cable Act, 47 U.S.C. 544(b).[4] Clearly, the technical standards which particular equipment and facilities must meet are "requirements for" and "related to" such equipment and facilities, within the meaning of Section 624(b) and its legislative history. *See* Pet. Br. at 16-17. Congress specifically said as much in the Committee Report, when it recognized that a franchising authority may "establish standards regarding facilities and equipment in

4. In addition, this claim ignores Section 626(c)(1)(B). When Congress directed franchising authorities to consider "signal quality" during renewal proceedings, it must necessarily have empowered franchising authorities to take all actions reasonably necessary to determine an acceptable level of signal quality—including the establishment of objective standards defining such a level.

the franchise *pursuant to Section 624(b)* which are not inconsistent with standards established by the FCC . . . ." Committee Report at 70 (emphasis added).

The Commission reads Section 624(b) as permitting franchising authorities to adopt only "non-technical" standards—which the Commission narrowly defines as equipment standards having nothing to do with signal quality. FCC Br. at 20-22. This construction finds no support in the language of Section 624(b), as noted above. According to the Commission, however, such a construction would follow a distinction contained in the Commission's 1974 technical standards preemption order which, it claims, Congress adopted *sub silentio* in the Cable Act. Significantly, if the FCC were correct (and it is not), this would be the only instance in the Cable Act where Congress adopted a pre-Act FCC policy without expressly saying so.[5]

Petitioners already have explained that the Cable Act does not codify the Commission's 1974 preemption order. *See* Pet. Br. at 22-25. Beyond that, the Commission severely misconstrues both its 1974 order and Section 624(b). The 1974 order simply excluded from its scope local requirements dealing with matters

5. *Compare* Committee Report at 27, 56 (The Cable Act "codifies these rules," referring to the FCC's cross-ownership rules); *id.* at 87 (EEO requirements "conform in large part to the Commission's required EEO program under existing regulation"). Congress, in fact, specifically grandfathered various FCC rules dealing with signal carriage in the provision immediately following Section 624(e). *See* Cable Act § 624(f), 47 U.S.C. § 544(f).

Contrary to the FCC's suggestion (FCC Br. at 22), Section § 624(f) has nothing to do with technical standards. It deals solely with "cable services," which is defined in Section 602(5), 47 U.S.C. § 522(5), in terms of "programming." *See* Committee Report at 70.

such as safety and construction.[6] Congress preserved local authority over these areas in provisions other than Section 624(b).[7] *See* Cable Act § 632(a) & (b), 47 U.S.C. § 552(a) & (b) (authorizing franchising authorities to enforce "construction-related" requirements); Cable Act § 636(a), 47 U.S.C. § 556(a) (Act does not affect local authority regarding matters of public health, safety and welfare). By vesting franchising authorities with the right to establish "requirements for" and "related to" cable facilities and equipment, Section 624(b) expands the rights of franchising authorities beyond that permitted in the Commission's 1974 order.[8]

The Commission also attempts to undermine the scope of Section 624(b) by reference to Section 624(a) of the Cable Act, 47 U.S.C. § 544(a), which states that franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent *consistent with this title.*" (Emphasis added). But this language is far from "limiting," as the FCC claims. Congress' broad definition of what constitutes

6. In its 1974 order, the Commission did not, as it now says, grant franchising authorities rights with respect to all of the matters noted in the FCC Br. at 21. Rather, the Commission simply indicated that it was not "directly concerned" with these matters in the 1974 order. *See Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 471-72 (1974). In fact, the Commission preempted certain of these matters specifically in other proceedings. *See, e.g., RVS Cablevision Corp.*, 36 (P&F) R.R.2d 1133, 1136 (Cable TV Bureau 1976) (franchising authority prohibited from requiring channel capacity in excess of FCC rules); *Lincoln Village West Cable TV*, 42 (P&F) R.R.2d 474, 487 (Cable TV Bureau 1978) (franchising authority prohibited from requiring rebuilding of cable system within certain time period).

7. This point appears to have been recognized by the Commission itself in the order under review. *See* Report and Order ¶ 17 n.12 (Pet. App. 73).

8. As this Court observed in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Commission had preempted all regulation of the "operational" aspects of cable. *Id.* at n.8, *citing Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975). Respondent National Cable Television Association specifically noted in its comments in the proceeding below (p.4, n.5) that the "Commission's preemption policy applies not only to regulation of cable system signal characteristics, but also to regulation of equipment furnished by individual vendors and ancillary microwave transmission systems." Section 624(b) clearly rejects this pre-Act FCC policy.

"consistent" action is discussed in Pet. Br. at 18-19. When Congress wanted to impose significant constraints on governmental authority, it chose substantially different language. *See* Cable Act § 611(a), 47 U.S.C. § 531(a) (authorizing franchising authorities to establish access requirements "only to the extent provided in this section"); Cable Act § 612(b)(2), 47 U.S.C. § 532(b)(2) (no governmental authority may require leased access capacity "in excess" of this section "except as otherwise provided in this section"); Cable Act § 623(a), 47 U.S.C. § 543(a) (franchising authorities may regulate rates "only to the extent provided under this section."). Section 624(a) does not impose such constraints.[9]

3. The Commission's Overly Broad Assessment of Its Preemption Authority Is Not Supported by A Fair Reading of Section 624(e)

The Commission's notions as to the unrestricted scope of its preemption theory are predicated upon a misreading of Section 624(e). This provision states only that the Commission "may establish technical standards relating to facilities and equipment. . . ." It does not give the Commission sweeping "plenary authority" in the field of signal quality standards. Where Congress wanted to vest the Commission with broad policy-making authority in specific areas of cable regulation, it chose language demonstrably different from that found in Section 624(e). *See* Cable Act § 612(g), 47 U.S.C. § 532(g) ("Commission may

9. The Commission cites the Committee Report for the proposition that "Congress plainly intended this Section to 'impose limitations on a franchising authority.'" FCC Br. at 22, quoting Committee Report at 68. In fact, the complete passage of the Committee Report provides that:

> This section is intended to provide *procedures for* and impose limitations on a franchising authority regarding the establishment of requirements related to services, facilities, and equipment provided by a cable operator.

Committee Report at 68 (emphasis added). As the language omitted by the FCC makes clear, Congress was not concerned with only limiting the rights of franchising authorities but also with establishing such rights.

promulgate any additional rules to provide diversity of information services"); Cable Act § 613(c), 47 U.S.C. § 533(c) ("Commission may prescribe rules with respect to the ownership or control of cable systems . . .").

The very purpose of the Cable Act was to "firmly establish the authority at each level of government." Committee Report at 24. Dissatisfied with the uncertain regulatory environment that had been created under generalized provisions of the Communications Act of 1934, *see* Pet. Br. at 3 n.1 & 23, Congress sought to "provide and delineate *within Federal legislation* the authority of federal, state and local governments to regulate cable systems" and thereby to "provide stability and certainty to the process of granting and renewing franchises." Committee Report at 22 (emphasis added). It would be contrary to the fundamental objective of the Cable Act to construe Section 624(e) as vesting the Commission with the unrestricted policy authority which it seeks in the field of cable technical standards—particularly given the rights and responsibilities which Congress also vested in franchising authorities in this area.

Congress expressed its intent as to the proper scope of technical standards preemption. In the Committee Report language already quoted, (*see* Pet. Br. at 17-18), Congress concluded that local standards would be preempted only insofar as they are "inconsistent" with particular standards—*not policy*—"established" by the Commission. As discussed in Pet. Br. at 16-20, this language makes clear that the FCC may not displace local standards where it fails to establish its own standards (either for particular classes of signals or for particular technical parameters); the Commission may not displace local standards simply because they are more stringent than or otherwise go beyond the Commission's admittedly incomplete standards.[10]

10. The Commission claims to defend its preemption order on the basis of the Cable Act alone, as opposed to generalized provisions in the original Communications Act of 1934. FCC Br. at 19 n.11. Yet it continues to invoke the 1934 Act. *Id.* at 16, 18 & 25. And it suggests that it may still have cable jurisdiction under that law—claiming that otherwise there would be no need for those provisions in the Cable Act which "bar the Commission from adopting certain regulations even though the Cable Act does not otherwise expressly grant the Commission the authority to take those actions." FCC Br. at 19 n.11.

The provisions cited by the Commission apply to "any federal agency," and not simply the FCC; thus, they are necessary to ensure that other federal agencies, whose jurisdictional grants are set forth in laws other than the Communications Act, do not regulate in the areas identified. These provisions do not override Congress' clear intent that any FCC regulation of "cable services" under the Communications Act is governed exclusively by the Cable Act. *See* Pet. Br. at 13 n.7. Indeed, had Congress intended to permit the Commission's retreat to the sanctuary of generalized provisions in the original 1934 Act, there would have been no need for the very provision upon which the Commission's case rests—Section 624(e) of the Cable Act. *See generally* Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543, 547 (1985); Meyerson, *Cable Television's New Legal Universe: Early Judicial Response to the Cable Act*, 6 Cardozo Arts & Ent. 1, 7-8 (1987).

4. The Commission's Preemption Order Is Not One That Was Sanctioned By Congress In The Cable Act

In sum, the Commission has fashioned its preemption policy without giving any consideration whatsoever, in the order under review, to key provisions of the Cable Act, such as the renewal provisions, which direct franchising authorities to consider "signal quality" "in light of community needs;" the commercial impracticability provision, which sets forth the Congressionally-approved procedure for dealing with the Commission's principal concerns here (*see* Pet. Br. at 26); Section 601(2), which provides that an important objective of the Act is to "assure that cable operators are responsive to the needs and interests of the local community" (*see* Pet. Br. at 27); and various provisions which define the key statutory term ("inconsistent") in a manner that directly conflicts with the FCC definition (*see* Pet. Br. at 18-19).

Furthermore, the Commission has misconstrued other provisions of the Act (Sections 624(b) & (e)); it has failed to recognize that Congress created a role for franchising authorities concerning technical standards, and it has inflated beyond Congressional contemplation its own role over matters of technical policy. It has sought to achieve one objective and one objective only—perpetuation of its pre-Act marketplace philosophy. And

thus it has been blind to those considerations which reflect a Congressional concern with localism in this area (*see* Pet. Br. at 27 & n. 23), as it has been blind to the need for a set of complete, modern and meaningful signal quality standards.

The FCC argues that its preemption order reflects a "reasonable accommodation of the competing policies." FCC Br. at 26. As the above makes clear, however, the Commission has failed even to identify, let alone "reasonably accomodate," the relevant considerations.

More importantly, Congress struck its own balance in the Cable Act; it drew the dividing line between federal and local regulatory authority over cable technical standards. Given the nature and underlying purpose of the Cable Act, the issue here necessarily turns upon the intent of Congress. And Congress did not intend for the Commission to banish franchising authorities from the field of signal quality standards. The order below, by confining franchising authorities to the Commission's outdated and incomplete standards, has this purpose and effect and therefore must be set aside. *See Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 154 (1982), quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961) (agency preemption order is unlawful if it "appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 87-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF NEW YORK, CITY OF MIAMI, CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Cable Communications Policy Act of 1984 allows the FCC to declare preempted all state and local technical standards for cable television signal quality.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members

have a vital interest in legal issues that affect the responsibilities and powers of state and local governments.

Amici are disturbed by the increasing frequency of allegations of impotence on the part of state and local governments to regulate in the public interest in any area that gives rise to some federal concern. The issue in this case is not one of express or even implied statutory preemption of state and local regulation. The question is whether a federal agency, which is enabled by statute to regulate and chooses not to, may assert *implied* authority to preempt state or local government regulation with *non*-regulation, even when the enabling statute expressly preserves state and local power to regulate.

The court below upheld the authority of the Federal Communications Commission under the Cable Communications Policy Act of 1984, 47 U.S.C. (Supp. II 1984) § 521 *et seq.* (the "Act" or "Cable Act"), to preempt the right of state and local franchising authorities to prescribe and enforce technical standards for the quality of certain cable television signals. The FCC acted to further a policy of deregulation that it followed prior to the enactment of the Cable Act. By that Act, however, Congress did not authorize the FCC to implement deregulation, but to establish technical standards, as a participant in a finely tuned, intergovernmental regulatory system. Moreover, the agency asserts the right to preempt state and local authority, not by adopting comprehensive standards at odds with state and local regulation, but by deferring to the standards of the marketplace, an action not sanctioned by the Act.

Congress, in enacting the Cable Act, modified and limited the broad authority that the FCC, with this Court's approval, had previously exercised over cable television under the Communications Act of 1934. Pub. L. No. 98-549, § 3(a), 98 Stat. 2780. Nevertheless, the FCC inferred that it retained such authority. Such an inference would turn the rules of statutory construction on their head. Congress's clearly expressed statutory purpose was to "establish guidelines for the exercise of *Federal, State, and local* authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3) (emphasis added). That stated purpose makes clear that the FCC must look to the Act itself for any preemptive authority that it may have. The Act envisions the "[c]oordination of Federal, State, and local authority" (47 U.S.C. § 556), directly contradicting the FCC's inference. The question presented therefore must be resolved by the well-established principle that Congress's intention to preempt state and local regulation is never presumed but must be clearly established. That principle applies *a fortiori* when Congress has not only expressly declined to occupy the field but, to the contrary, has expressly authorized dual regulation.

If the decision below is affirmed, federal agencies will be free to pursue their own deregulatory policy agendas without explicit congressional direction. Further, the participation of state and local governments in the political process will be undermined if federal agencies may disregard congressional enactments that are hammered out by legislative compromise to rectify statutory inattention and cure regulatory uncertainty in developing areas of commerce. Finally, state and local governments will be left powerless to meet the needs of their communities whenever a federal agency asserts that an implied congressional policy of deregulation permits it to elevate that policy above the language of its enabling statute. Because of the importance of the case to *amici* and their members, *amici* submit this brief to aid the Court in its consideration of this case.[1]

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[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE AND INTRODUCTION

Amici agree with the petitioners' statement, but wish to emphasize certain facts about cable television regulation and the background of the Cable Communications Policy Act of 1984, 47 U.S.C. (Supp. II 1984) § 521 *et seq.* (the "Act" or the "Cable Act").

The cable television era began with isolated attempts to improve reception of broadcast television signals by use of community antennas.[2] As the cable medium evolved, "uncertainty was a hallmark of cable regulation." D. Brenner & M. Price, Cable Television and Other Non-broadcast Video: Law and Policy § 2.01 (1986). "Although both the FCC and local governments asserted regulatory authority over cable television, the breadth of their respective powers was ill defined." *ACLU v. FCC*, 823 F.2d 1554, 1559 (D.C. Cir. 1987).

Prior to the enactment of the Cable Act in 1984, "there ha[d] never been a national policy to guide the development of cable." H.R. Rep. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4655 ("House Report"). "Most decisions related to the award of a cable franchise [had] historically been made at the municipal level." House Report at 23. State and local governments exercised their police powers to address franchising terms and conditions to ensure that cable operators were responsive to community needs. *See, e.g., TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970). The FCC asserted authority to regulate cable pursuant to its authority over interstate communication under the Communications Act of 1934, 47 U.S.C. §§ 151, 152(a), 301. See *Capital Cities*

[2] Cable has evolved to the point where its future is said to involve the "merging of transmission capacity with current and yet-to-be invented one-way and two-way program and information services." D. Brenner & M. Price, Cable Television and Other Non-broadcast Video: Law and Policy § 1.02 (1986).

Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

The Communications Act, however, predated not only cable television, but broadcast television itself. Because the Communications Act could not address a medium that did not yet exist, and because Congress failed, until 1984, to enact statutes that addressed the developing cable medium, the FCC was left with broad discretion over cable regulation, subject to case-by-case challenge in the courts. *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649, 669-70 (1972) (FCC had power to enforce program origination rules); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (FCC had no power to enforce common carrier access and channel capacity rules). Before Congress stepped in with the Cable Act and apportioned jurisdiction among federal, state, and local governments, the FCC took advantage of regulatory uncertainty to pursue its own approach to regulation and preemption during cable's formative years.

The FCC first asserted exclusive authority over technical aspects of cable and promulgated technical standards for cable transmission of broadcast signals (Class I channels) in 1972. See Cable Television Report and Order, 36 F.C.C. 2d 141, 198-210 (1972). At that time, the FCC characterized these as "minimum" standards that should eventually be augmented to cover many important technical areas not yet addressed. *Id.* Local regulation of technical parameters not addressed by the FCC standards, as well as the imposition of more stringent guidelines for FCC-regulated parameters, were contemplated. See Reconsideration of Cable Television Report and Order, 36 F.C.C. 2d 326, 359-64 (1972).

Two years later, the FCC reversed field and asserted the power to preempt all standards that exceeded its minimum level. See Report and Order in Docket No. 20018, 49 F.C.C. 2d 470, 480 (1974). The FCC stated,

however, that its standards were minimum in the "sense of being explicitly incomplete" and that "more complete and refined" national standards would be forthcoming. *Id.* at 472, 477-78. They were not. Becoming convinced that deference to the marketplace was the more desirable policy, the FCC has since refused to update its 1972 Class I standards, to establish standards for unregulated signal quality parameters,[3] or to establish any standards for Class II, III, or IV channels.[4] Following enactment of the Cable Act, and despite provisions in that Act relating to technical standards, the FCC decreed that its minimum standards would not be updated, would not be applied to previously unregulated signal parameters, would no longer be federally enforced, and could not be exceeded or supplemented by non-federal regulation. See Report and Order in MM Docket No. 85-38, 50 Fed. Reg. 52,462 (1985). The question in this case is whether the FCC, by this fiat, may preempt state and local regulation of signal quality, extending its deregulatory policies, notwithstanding enactment of the Cable Act. The answer turns upon an interpretation of that Act.

SUMMARY OF ARGUMENT

This Court's decisions have established a framework for determining whether federal law displaces the authority of state and local governments to regulate on a given subject. These decisions make clear that preemption analysis must start with a careful reading of the

[3] The court below recognized that "the FCC's standards for Class I channels regulate only four of apparently twenty-four possible technical parameters that directly affect signal quality." Pet. App. 22-23.

[4] The court of appeals reversed the FCC's determination not to issue standards for these channels and remanded that portion of the case for an explanation why standards were not required or the issuance of standards. Pet. App. 31-35.

statute to determine whether Congress has authorized federal law to "occupy the field" or whether state and local regulation is preempted only to the extent that it actually "conflicts" with federal law.

The court below erred in applying principles of "occupation of the field" preemption because the Cable Act specifically authorizes state and local, as well as federal, regulation. The Cable Act establishes "a national policy" clarifying the system of federal, state, and local government regulation of cable television. Numerous specific provisions authorize "consistent" state and local regulation, while preempting "inconsistent" state or local law. The Act recognizes that state and local franchising authorities must exercise regulatory authority to discharge their responsibilities under the law, and does not express the policy of deregulation that the FCC has espoused. The Act expresses a congressional intent to preempt only that state and local law which is in actual conflict with federal law.

The majority decision below, rather than examining what Congress said in the Cable Act, looked for express language terminating the FCC's previous preemption policy. Not finding such express language, the court of appeals inferred that Congress had endorsed the FCC's previous preemption policy, in part because of this Court's decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). What the majority overlooked was that the enactment of the Cable Act ended FCC jurisdiction over cable television under the Communications Act, except to the extent authorized under the Cable Act, and thus ended the relevance of *Crisp*. With the Cable Act, Congress wrote on a clean slate.

When Congress has not "occupied the field," state and local regulation will be deemed preempted only when there is an actual conflict between state and federal law. The Cable Act, both by its terms and by its legislative

history, demonstrates that state and local technical standards for signal quality are not "inconsistent" with any provision of the Act or with any congressional policy objective. They are "inconsistent" only with the FCC's own goal of non-regulation. But as this Court ruled in *Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890, 1901 (1986), the agency cannot "confer upon itself power" to "take action which it thinks will best effectuate a federal policy." The FCC ignored the change in its enabling legislation by simply proclaiming that state and local standards were preempted, regardless of whether they were compatible with FCC regulation. The decision of the court of appeals, which affirmed that agency proclamation, must be reversed.

ARGUMENT

I. THE COURT OF APPEALS CONFUSED "OCCUPATION OF THE FIELD" PREEMPTION WITH "ACTUAL CONFLICT" PREEMPTION.

The Supremacy Clause of the Constitution, U.S. Const., Art. VI, cl. 2, provides Congress with the power to preempt state law. A court's determination of preemption must therefore begin with an examination of congressional intent, the touchstone of preemption analysis. *See California Federal Savings & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 689 (1987); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). Preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The Court will "not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). Courts are rightly slow to find preemption because "the state is powerless to remove the ill effects of [the court's] decision, while the

national government, which has the ultimate power, remains free to remove the burden" of a finding of no preemption. *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). Accordingly, "the proper approach is to 'reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch*, 414 U.S. at 127 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). This Court has provided an analytical framework, involving two distinct types of preemption, for determining when Congress has intended to supersede state law.

"Occupation of the field" preemption, the first and broadest form of preemption, occurs when Congress has, expressly through statutory language or implicitly through its statutory scheme and purpose, displaced state and local regulation of a particular subject. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit language, intent to preempt state law may be inferred when Congress has legislated so pervasively, occupying an entire field of regulation, that it has left no room for the States to supplement federal law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The inference arises because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Id.*

"Occupation of the field" preemption may be inferred only in narrow circumstances:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no

other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). An inference of preemption may arise through pervasive federal agency regulation as well as congressional legislation. Agency preemption, however, must be consistent with the statutory scheme established by Congress, and within the authority expressly conferred upon the agency by Congress. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

"Conflict" preemption, a second and more limited form of preemption, occurs when a "state law is nullified to the extent that it actually conflicts with federal law." *de la Cuesta*, 458 U.S. at 153. An actual conflict arises when "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime*, 373 U.S. at 142-43), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Preemption based upon an actual conflict has a fundamentally different effect from "occupation of the field" preemption. "Conflict" preemption does not invalidate state regulations that merely exceed federal minimum standards or fill vacuums in federal standards. *See, e.g., Florida Lime*, 373 U.S. at 144-45. Furthermore, courts will not find "conflict" preemption between a federal and state regulation based upon a mere hypothetical conflict. *See California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1429 (1987); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 389 (1983); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130-31 (1978). Finally, where Congress expressly contemplates a state role in regulation, the exercise of state regulation will not be found to "frustrate"

or conflict with general policy objectives such as national uniformity. *See Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890 (1986); *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (national power to promote nuclear power generation did not displace state regulation motivated by economic considerations).

The majority below took the view that the FCC had the authority to preempt, by *ipse dixit*, state and local regulation of cable television signal quality. That declaration can be affirmed only if the Cable Act confers upon the FCC the authority to "occupy the field" and thereby preclude all state and local regulation.

II. CONGRESS DID NOT INTEND THAT THE FCC "OCCUPY THE FIELD" OF CABLE TELEVISION REGULATION.

The Cable Act, far from expressing congressional intent to "occupy the field" of cable television regulation, expressly contemplates dual regulation by the federal government and by state and local governments. The Act's carefully crafted provisions preempt only "inconsistent" state and local regulation. The court below erred when it looked to *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), which was decided under the Communications Act of 1934, instead of looking to the provisions of the Cable Act itself.

A. The Cable Act Preempts Only "Inconsistent" State And Local Regulation.

This Court's decisions on "occupation of the field" preemption do not support a finding that Congress intended to displace state and local governments from the field of cable television signal quality or to allow the FCC to do so. The Cable Act contains no express endorsement of such sweeping preemption. To the con-

trary, the language of the Act, the statutory scheme, and the legislative history preclude a finding that Congress intended federal regulation to occupy the field.

Congress enacted the Cable Act to fill a statutory void. The first purpose of the Act is to "*establish* a national policy concerning cable communications." 47 U.S.C. § 521(1) (emphasis added). But Congress did not choose a system of exclusive federal authority to correct the existing regulatory uncertainty. Rather, the Act was intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). Most important for purposes of the inquiry here, the Act was intended to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to *the needs and interests of the local community*." 47 U.S.C. § 521(2) (emphasis added).

The legislative history indicates the importance of these three purposes. The House Report explains that "[a] significant purpose of [the Act] is to address the problems which have arisen in the franchise process, and to provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems." House Report at 22. Congress acknowledged that the local authority to regulate "has been under an increasing number of challenges" in the courts, at the FCC, and at state public utility commissions. *Id.* at 19. The Cable Act was intended to "preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service." *Id.* Thus, the "national policy" established to "clarif[y] the current system of local, state, and Federal" cable regulation "continues reliance on the local franchising process as the primary means of cable regulation." *Id.*

Far from occupying the field, the Act expressly allocates regulatory power to state and local governments, as well as to the FCC. The Act recognizes the significant interest that state and local governments have in the growth and management of cable communications systems. One court has observed that Congress intended to create a "finely-tuned system" of coordinate authority. *Housatonic Cable Vision Co. v. Department of Public Utility Control*, 622 F. Supp. 798, 812 (D. Conn. 1985).

This dual regulatory structure pervades the Cable Act, in which Congress repeatedly approved "consistent" or "not inconsistent" state and local regulation and preempted only that which is "inconsistent."[5] For example, Section 624 generally authorizes state and local regulation of services, facilities, and equipment, subject to federal guidelines and limitations. 47 U.S.C. § 544. Although franchising authorities may not regulate "services, facilities, and equipment" of a cable operator "except to the extent consistent" with the Act (47 U.S.C. § 544(a)), they may establish requirements for facilities and equipment in a request for proposals for a franchise. 47 U.S.C. § 544(b). Section 624(e), which is directly at issue in this case, states that the FCC "may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. § 544(e). The legislative history clarifies that this authority "does not affect the authority of a franchising authority to establish standards . . . which are *not inconsistent with standards*

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[5] See, *e.g.*, 47 U.S.C. § 551(g) (state and local subscriber privacy laws consistent with this section are permitted); 47 U.S.C. § 553(c)(3)(D) (state and local theft of service laws consistent with this section are permitted); 47 U.S.C. § 554(i) (state and local equal employment opportunity standards consistent with this section are permitted); 47 U.S.C. § 556(a), (c) (state and local regulation of police power matters consistent with the Act is preserved; state and local law inconsistent with the Act is preempted).

established by the FCC under this subsection." House Report at 70 (emphasis added).

Other provisions of the Act illustrate that Congress could not have intended to reserve the field of setting standards for cable television facilities and equipment to the FCC alone. Section 626 of the Act mandates a procedure for renewal of a cable operator's franchise. 47 U.S.C. § 546. Franchising authorities must consider, *inter alia*, whether "the quality of the operator's service, *including signal quality* . . . has been reasonable in light of community needs." 47 U.S.C. § 546(c)(1)(B) (emphasis added).[6]

A franchise must be renewed unless specific "adverse findings" are made (47 U.S.C. § 546(d)); and the denial of renewal will be reversed upon judicial review unless "supported by a preponderance of the evidence, based on the record" of the renewal proceeding. 47 U.S.C. § 546(e)(2)(B). These procedural rules, in combination, effectively require state and local franchising authorities to establish objective standards for measuring signal quality. Congress could not have intended to preclude franchising authorities, who must evaluate signal quality, from establishing objective standards for determining that a system that satisfies the FCC's minimum guidelines, but nevertheless delivers a poor television picture, is unacceptable because it is "not responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).[7]

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[6] Petitioner below asserted without contradiction that the single most prevalent subscriber complaint involves unacceptable signal quality. See Brief for City of New York (D.C. Cir. No. 85-1841) at 4. Such complaints account for 50% to 75% of all complaints and are usually mediated by the franchising authority. *Id.*

[7] Congress also provided a mechanism for cable operators to resist excessive or onerous local regulation. Section 625 of the Cable Act permits a cable operator to demand modification of the franchise requirements for facilities or equipment because of commercial impracticability. 47 U.S.C. § 545(a)(1)(A). The franchising authority must hold a public hearing within 120 days from the request (47 U.S.C. § 545(a)(2)); denial of the request permits the cable operator to seek relief in federal court. 47 U.S.C. § 545(b). Like decisions regarding renewal, the modification procedure cannot realistically address signal quality without reference to meaningful objective standards.

The specific preemption provisions of the Cable Act themselves confirm that federal law was not intended to occupy the field. Section 636 of the Act, entitled "Coordination of Federal, State, and local authority," provides in subsection (a) that "[n]othing in [the Cable Act] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [the Act]." 47 U.S.C. § 556(a). Subsection (b) expressly reserves jurisdiction in the States to regulate: "Nothing in [the Cable Act] shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with [the Act]." *Id.* at § 556(b). Subsection (c) explicitly codifies "conflict" preemption, rather than "occupation of the field" preemption, nullifying only inconsistent state and local regulations: "[A]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded." *Id.* at § 556(c).

The express authorization of consistent state and local regulation refutes the court of appeals' conclusion that the FCC may by fiat deregulate the industry by preempting regulation that is not in actual conflict with unenforced federal guidelines. Even the majority recognized "the apparent incompatibility" between the FCC's preemption of state regulation, and the Act's require-

ment (in 47 U.S.C. § 546(c)(1)(B)) that franchisors consider the quality of a cable operator's signal when considering renewal. Pet. App. 34. This incompatibility

> calls into question whether Congress intended that the Commission have the authority to preempt franchisors' signal quality standards and replace them with no standards at all—Congress' decision to require an objective assessment of cable operators' signal quality strongly suggests it intended someone, either the FCC or the franchisors, to establish objective standards for Class II, III and IV channels.

Id. In this regard, the majority was eminently correct. Congress did not intend deregulation. But neither did the Cable Act give the FCC greater authority to preempt by deregulation than by regulation.

Congress is capable of supplying an agency with deregulatory authority when it so desires.[8] Congress also knows how to prohibit supplemental, more stringent, or different standards, when it desires to do so. It did so in Section 612(b)(2) of the Cable Act, which prohibits franchising authorities from requiring cable operators to designate leased access channel capacity in excess of the capacity specified in Section 612(b)(1). 47 U.S.C. § 532(b). Similarly, in Section 613(d) of the Act, Congress prohibited state and local governments from establishing cross-ownership restrictions. 47 U.S.C. § 533(d).[9]

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[8] *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1194-95 (D.C. Cir. 1985) (collecting cases); see also Energy Policy and Conservation Act, §§ 325(b), 327(a), 42 U.S.C. §§ 6295(b), 6297(a) (Secretary of Energy empowered to preempt state energy efficiency standards if the Secretary has decided to establish no corresponding federal standards).

[9] See also National Traffic and Motor Vehicle Safety Act, § 103(d), 15 U.S.C. § 1392(d) (state motor vehicle standards that are not "identical" to federal standards are prohibited); Federal Insecticide, Fungicide and Rodenticide Act, § 24(b), 7 U.S.C. § 136v(b) (state pesticide labeling standards that are "in addition to or different from" federal standards are prohibited); Federal Meat Inspection Act, § 408, 21 U.S.C. § 678 (state meat marking, labeling, packaging, or ingredient standards that are "in addition to, or different from" federal standards are prohibited).

As this Court has observed in a different context, "the forces of change do not always or necessarily point in the direction of deregulation." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). Where, as here, Congress has not intended deregulation, the agency's decision not to regulate cannot be allowed to foreclose the regulatory authority of state and local governments.

More important, Congress clearly did not intend that state and local regulation would be preempted where there was no demonstrated incompatibility upon which to base a "conflict" preemption challenge. Congress chose the phrase "not inconsistent." It could hardly have chosen more accurate and precise language to authorize the narrow preemption of only those particular state or local regulations that are in demonstrable, actual conflict with federal law.

B. This Court's Decision In *Crisp* Does Not Support Preemption In This Case.

The court of appeals' reliance on *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), to support its finding of preemption, was misplaced. *Crisp* involved the FCC's preemption power under the legislation existing at that time, the Communications Act of 1934. Consequently, to determine whether the FCC had authority to preempt state signal carriage regulation, the *Crisp* Court looked to the broad language of the Communications Act.[10] That Act no longer has any relevance to the FCC's authority over cable television. The Cable Act specifies that the FCC now has jurisdiction over cable service under the

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[10] The Communications Act provided authority to the Commission to regulate interstate communications by wire and radio. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

Communications Act only to the extent provided in the Cable Act. Pub. L. No. 98-549, § 3(a), 98 Stat. 2780. Where there is no jurisdiction, there certainly can be no preemptive power.

Crisp in any event recognized that an agency's attempt to preempt state and local regulation must be overturned where "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Crisp*, 467 U.S. at 699 (citations omitted). Clearly, the Cable Act negates any congressional intent that the federal government "occupy the field." The Act "establishes guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). The Act not only contemplates, but expressly authorizes, continuing state and local regulation. The FCC's attempt to preempt all state and local regulation of signal quality can find no support in the *Crisp* decision.[11]

[11] *Crisp* relied heavily upon *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), which arose under the Home Owners Loan Act of 1933 ("HOLA"), 12 U.S.C. §§ 1461-1468. The inquiry in *de la Cuesta* is instructive. The Court announced that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Id.* at 153. The Court recognized, however, that the analysis does not end there. The Court must determine whether Congress intended to delegate preemptive authority to the Board. *Id.* at 159. The *de la Cuesta* Court examined the language and history of HOLA. HOLA granted the Federal Home Loan Bank Board "plenary authority to issue regulations governing federal savings and loans." *Id.* at 160. The Court found that " 'it would have been difficult for Congress to give the Bank Board a broader mandate.' " *Id.* at 161 (citation omitted). "[T]he statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 162. After reviewing the Act, its statutory scheme, and legislative history, the Court concluded: "Nowhere is there a suggestion of any intent somehow to limit the Board's authority." *Id.* at 164. Consequently, the Court concluded that the Board's preemptive regulation was within the power granted it by Congress. In sharp contrast, the Cable Act is replete with expressions of congressional intent to protect the coordinate regulatory power of state and local governments.

Congress's failure to disavow *Crisp* expressly should receive no weight at all. Congress was not concerned with whether *Crisp* was correctly decided. It was concerned with superseding the statute that *Crisp* construed. Congress recognized that there had been no national cable policy before the Cable Act. House Report at 19. That Act was written on a clean slate. There was thus no reason for Congress legislatively to "overrule" the *Crisp* decision when the new statute would make *Crisp* irrelevant.

In any event, there is no doctrine of congressional acquiescence in agency assertions of preemptive power. Pet. App. 47 (Mikva, J., dissenting). Nor should there be. In a preemption case, the touchstone is congressional intent, not the prior policies of a federal agency.[12]

III. STATE AND LOCAL REGULATION OF TECHNICAL STANDARDS FOR SIGNAL QUALITY DOES NOT CONFLICT WITH THE FEDERAL POLICY EXPRESSED IN THE CABLE ACT.

Because the Cable Act preempts only inconsistent state and local regulation, the court of appeals plainly erred in upholding the FCC's broad preemptive declaration on an

[12] The court of appeals referred to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the deference generally accorded an agency's construction of intentional or inadvertent statutory "gaps"; but that case is not relevant here. First, the FCC's tortured interpretation of a commonly used term does not support a finding of "imprecise" statutory language. Pet. App. 23-26. Second, *Chevron* deference is not applicable to administrative constructions of a statute "that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 143 (1984) (citation omitted). In particular, the Court does not defer to an agency's determination of its power to preempt. *See Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890, 1898-99 (1986).

"occupation of the field" basis. Nor can "conflict" preemption be found on this record. As we have shown in Part I, *supra*, a conflict will be found only when "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The fact that state regulations exceed federal minimum standards or fill gaps in federal standards does not establish the existence of a conflict. *See, e.g., Florida Lime*, 373 U.S. at 142-43; *see also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Nor does a hypothetical conflict between federal and state regulation suffice. *See California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419 (1987); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375 (1983).[13]

Because the Cable Act specifically contemplates state and local regulation, the mere existence of state and local technical standards for signal quality plainly would not frustrate "the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Where Congress expressly provides for a state role in regulation, the exercise of state regulatory authority will not be found to "frustrate" or conflict with general policy objectives such as national uniformity. *Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890

[13] As Judge Mikva pointed out in dissent below (Pet. App. 44-45), the court of appeals' holding that the FCC may place a federal ceiling on state regulation is "at odds" not only with this Court's decisions on "conflict" preemption and with common sense, but also with dictionary definitions of "inconsistent" as "incompatible" (Webster's Third International Dictionary 1144 (1981)), or "mutually repugnant or contradictory" (Black's Law Dictionary 689 (5th ed. 1979)).

(1986). The agency's own "policy objective" cannot override the validly enacted regulations of a State or a local government when Congress has directly authorized such regulations.

The *Louisiana Public Service Comm'n* case is closely in point. In that case, the Court, finding that Congress had denied the power to preempt state depreciation formulas used in setting intrastate telephone rates, said, "we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer upon itself power." 106 S. Ct. at 1901. Here, as in *Louisiana PSC*, the FCC has attempted to override state regulatory power in the face of express congressional authorization for the exercise of that power. *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (national policy objectives of nuclear power generation do not displace traditional state authority to regulate utilities).

The national objective established by Congress is not uniform regulation, still less deregulation, but a federal, state, and local regulatory structure for cable television, preserving the authority and meaningful voice of each. Maintaining that structure requires reversal of the judgment below and invalidation of the FCC's preemptive declaration.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

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CITY OF WHEATON, and NATIONAL LEAGUE OF CITIES,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF MONTGOMERY COUNTY, MARYLAND AND THE CITY OF ST. LOUIS, MISSOURI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF MONTGOMERY COUNTY, MARYLAND AND THE CITY OF ST. LOUIS, MISSOURI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

This Brief *Amici Curiae* is filed pursuant to Rule 36.4 of the rules of this Court on behalf of Montgomery County, Maryland and St. Louis, Missouri.

Montgomery County, Maryland and St. Louis, Missouri franchise cable television transmission systems within their respective jurisdictions pursuant to federal, state

and local law.[1] Because a cable franchisee is a monopoly provider of cable service who permanently occupies the public rights-of-way, amici have taken great care in developing cable television ordinances, choosing franchisees, and negotiating and enforcing detailed franchise contracts.[2] Amici have devoted substantial public resources to assuring that the cable systems in their jurisdictions do not interfere with other uses of the public ways and that the cable operators provide the best possible service to the public.

At stake in this case is the ability of Montgomery County, St. Louis and other local franchising authorities to require minimum technical standards for the performance of the cable transmission systems in their communities. These technical standards measure the quality of the electronic signals delivered to cable system subscribers. The quality of the signal determines the clarity of the picture that subscribers see and the sound they hear. Even if a signal is often interrupted, the picture is always "snowy," or the sound is consistently poor, cable subscribers cannot switch to another cable system, just as they cannot change gas, electric or local telephone companies if they are dissatisfied with the service. Dissatisfied cable subscribers are forced either to give up cable television altogether or pay for and put up with inferior service—and, in either case, complain to their local government, which is responsible for selecting the cable operator and enforcing the cable franchise agreement. Without technical standards, amici and other local franchising authorities will be deprived of critical tools

[1] Each amici is a franchising authority within the meaning of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 47 U.S.C. §§ 521-611 ("Cable Act"). Each has authority to regulate cable television under state law and local ordinance.

[2] Montgomery County has granted a cable franchise to one company to serve the entire county, while St. Louis has granted franchises to two companies, which serve different areas of the city.

for assuring that the cable subscribers within their jurisdictions receive the quality of cable service they are entitled to. Moreover, amici and other franchising authorities will be unable to carry out in a fair and objective manner many of the regulatory responsibilities assigned to them by Congress under the Cable Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Local Governments, The Cable Industry and Technical Standards

A cable television transmission system is an integral part of the infrastructure of a community. Most of a cable system's distribution plant is located on public property; some is located on private property pursuant to public or private easements. Cable companies, like gas, electric and telephone utilities, have traditionally needed state or local government permission to use these public property rights. In addition, much like gas, electric, and telephone utilities, a cable transmission facility requires a heavy initial capital investment in the physical plant, and substantial ongoing expenditures for repair and maintenance. Once a core system is built, however, only a small additional investment is needed to add new customers, and the average cost to serve a customer declines with each additional customer served.

Given these facts, it is highly unlikely that two cable transmission facilities can coexist permanently in any area to serve the same subscribers.[3] In the approximately 21,500 different local communities throughout the country that have cable television (*Television & Cable Factbook*, Cable and Services Volume, A-42 (1987 ed.)), only a bare handful have competing cable operators that offer consumers a choice of cable providers. In virtually all

[3] *See, e.g.*, Noam, *Towards An Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 Fed. Comm. L.J. 209, 242 (1982).

other communities, including Montgomery County and St. Louis, a cable franchisee enjoys a *de facto* monopoly.

Because there is no meaningful competition to a cable operator in most communities, competitive forces cannot be counted on to assure that the cable operator provides the best available cable service. A properly designed, installed and monitored cable television system can carry the entire spectrum of electronic communications, including television signals, computer data, and two-way voice communications. A poorly designed or maintained system will not be as capable. Although some cable operators provide consistently good signal quality, others allow poor transmission quality to continue unabated for long periods of time. *See, e.g.*, Hammett & Edison, Inc., Engineering Statement, J.A. at 56-59. Most often, transmission quality problems occur because of faulty design, shoddy construction, or neglected maintenance, each of which may be the result of income maximization in a business not subject to direct competition. To guarantee that the public receives good cable service, a local government must continuously monitor and enforce the performance of the system. This can only be accomplished by means of objective technical standards.

The technical standards at issue in this case are performance standards that measure the quality of the signals transmitted by a cable company to its subscribers. Allowing local governments to establish and enforce minimum technical standards will not place any burden on the industry, which is composed of many cable companies serving thousands of local communities, since technical standards do not specify design criteria for the equipment used in a cable system. Thus, technical standards do not affect the development or design of the various types of equipment that may be available nationally for use in a cable system. Engineers designing a system for a specific community must design a system that takes into account the physical characteristics of the community, as

well as the performance standards the system must meet. This may be done using many commercially available types of equipment and facilities to satisfy the requirements of a particular community, including the technical performance requirements that will determine the quality of the signal that the cable subscribers will receive.

The Cable Act

The Cable Act is a comprehensive statute, establishing "a national policy that clarifies the current system of local, state and Federal regulation of cable television." Report of the Comm. on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4656 ("Committee Report"). The Cable Act accomplishes its regulatory purpose by "reliance on the local franchising process as the primary means of cable television regulation. . . ." *Id.* This is in stark contrast to the centralized system of federal licensing that Congress established for broadcasting.[4] The Cable Act's legislative history emphasizes again and again the important role of local governments in regulating cable television. The Committee noted that municipal authority to franchise and regulate cable television systems had been under challenge "in the courts, at the Federal Communications Commission, and at the state public utility commissions." Committee Report at 19, 1984 U.S. Code Cong. & Admin. News at 4656. Congress responded with the Cable Act to "*preserve the critical role of municipal governments. . . .*" *Id.* (emphasis supplied).

In contrast to the Cable Act's affirmation of the critical role of local governments, the statute assigns the Fed-

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[4] *See, e.g.*, the broadcast regulatory scheme established by the Radio Act of 1927, 44 Stat. 1162, and continued in the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, particularly §§ 301-510 (West 1962 & Supp. 1987), which preempts any state or local regulation of broadcasting.

eral Communications Commission ("FCC") an ancillary role in the regulation of cable television. Noting that the FCC had "exercised some control over cable franchising . . ." in the past, the Committee Report briefly discussed past FCC efforts at cable regulation. In the context of this discussion, however, the Committee made clear where principal responsibility would lie in the future: "It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." Committee Report at 23-24, 1984 U.S. Code Cong. & Admin. News at 4660-61.[5]

Throughout the Cable Act, Congress gave explicit authority to local governments to regulate cable television, as well as the necessary tools to allow them to regulate cable in the public interest. Congress delegated to local governments sole regulatory responsibility for specific areas, including several where technical standards are necessary: the authority to require public, educational and governmental access channels (47 U.S.C. § 531); general authority to grant and enforce franchises (47 U.S.C. § 541); the authority to require particular facilities and eqiupment in a cable system (47 U.S.C. § 544); responsibility for assessing the past performance and proposals for future service of a cable operator to determine whether an expiring franchise should be renewed (47 U.S.C. § 546); and the authority to require and enforce

[5] The Report goes on to discuss the importance of federal standards to guide local regulatory policy. *See* Committee Report at 24, 1984 U.S. Code Cong. & Admin. News at 4661. It speaks, however, about "uniform Federal standards that are not continually altered by Federal, state or local regulation." *Id.* Because the Committee Report emphasizes uniform standards not subject to continuing change, it seems clear that the Committee is referring to the few statutory standards specified in the Cable Act itself, and not to discretionary regulations promulgated by the FCC, such as the technical standards at issue here.

consumer protection provisions in a franchise (47 U.S.C. § 552).

Performance of each of these tasks assigned by Congress to local franchising authorities requires that local governments have the practical ability to address issues that involve the signal quality of a cable system. Measuring or evaluating signal quality can be done fairly and effectively only by reference to objective engineering and technical standards that quantify signal quality.

Proceedings Below

Prior to the Cable Act, the FCC required cable television operators to comply with certain technical performance standards on an annual basis. *See* 47 C.F.R. §§ 76.601-17 (1984). Those technical standards were established in 1972, prior to advances in electronics that have created the capability for far more sophisticated and reliable cable transmission system. Moreover, the FCC standards applied only to the signals of broadcast television stations that were received off the air by the cable operator and then rebroadcast on the cable system (Class I signals). In 1972, the carriage of other types of signals on cable systems was rare and the FCC did not adopt standards for the signals of non-broadcast television, encoded services, or two-way interactive services (Class II, III, and IV signals). In the 1972 order, the FCC acknowledged that its standards were, even at the time they were adopted, "minimal and should be augmented as soon as possible." *Cable Television Report and Order*, 36 F.C.C. 2d 141, 204, *aff'd on reconsideration*, 36 F.C.C.2d 326 (1972). Nevertheless, the FCC has never updated the 1972 standards. *Report and Order* in Docket No. 85-38, Appendix to Petition for Writ of Certiorari at 52.

Not only did the FCC's admittedly deficient 1972 technical standards apply only to a minority of cable channels, the standards did not address all relevant perform-

ance parameters.[6] Nonetheless, in 1974, the FCC preempted more stringent local regulation of technical standards. *Report and Order* in Docket No. 20018, 49 F.C.C. 2d 470 (1974). The policy did not, however, diminish the need for objective technical standards, and many local franchise agreements contain additional technical standards, agreed to voluntarily by the cable operators, which are more modern and comprehensive than the FCC standards.[7]

In 1985, after passage of the Cable Act, the FCC reevaluated its technical standards in light of the new law and took the action at issue here. Notwithstanding the Cable Act's emphasis on local responsibilty to grant, administer and enforce franchises, the FCC decided to preempt local technical regulation, while at the same time downgrading its own enforcement efforts. *Report and Order*, Appendix to Petition for Writ of Certiorari at 65-67. The agency relabeled its outdated and deficient technical regulations as "standards" available to franchise authorities that chose to enforce them, but prevented franchising authorities from establishing more stringent Class I standards, or any standards at all for the other classes

[6] *See* Hammett & Edison, Inc., Engineering Statement (J.A. at 54-62) and Atlantic Research Corporation, Engineering Statement (J.A. at 29-42) for extensive discussions of the inadequacy of the FCC's technical standards, even with regard to Class I signals.

Perhaps the most easily understood technical parameter is the signal-to-noise ratio. A system operating at the current FCC signal-to-noise guideline would display a noticeable amount of noise (snow) and moving herringbone and random line patterns. *See* Atlantic Research Corporation, Engineering Statement (J.A. at 30-31). Other technical parameters involve reliability and other aspects of picture quality, and determine the capability of the system to perform other tasks, for example, transmitting data within specified error rates. *See* Hammett & Edison, Inc., Engineering Statement (J.A. at 65-66).

[7] Montgomery County's franchise agreement, for example, has technical standards considerably more stringent than the FCC's Class I standards. The County's signal-to-noise standard, for example, is 44 dB, significantly higher than the FCC's 36 dB standard. St. Louis incorporated into its franchise agreements technical standards proposed by its cable operators that are more stringent than the FCC's technical standards.

of cable signals. *Id.* Appendix to Petition for Writ of Certiorari at 75-76. The FCC based its preemption of technical standards on the assumption that adequate competition exists to cause cable systems to keep signal quality high, but offered no evidence for this assumption, stating only that "cable television systems operate in an increasingly competitive environment." [8]

On appeal, the Court of Appeals affirmed the FCC's authority to preempt with respect to standards for Class I signals. *City of New York v. F.C.C.*, 814 F.2d 720, 726 (D.C. Cir. 1987). With respect to Class II, III and IV signals, however, the court vacated and remanded to the agency. *Id.* at 728.

Summary of Argument

The FCC cannot preempt local regulation of technical standards for cable systems because there is no clear indication in the Cable Act of congressional intent to allow the FCC to do so. A careful examination of the language of the Cable Act shows that Congress did not grant preemptive jurisdiction to the FCC and, moreover, that Congress intended local governments to play a key role in areas that require the use of objective technical standards. This absence of a grant of preemptive au-

[8] *Id.* Appendix to Petition for Writ of Certiorari at 65. In its discussion of the proposed rule, *Notice of Proposed Rule-Making* in Docket No. 85-38 (J.A. at 2), the Commission mentioned competition to cable systems: "competition has increased from several sources, including video cassette recorders, satellite home earth terminals, and multipoint distribution systems." J.A. at 8. No evidence was advanced to support this assertion, nor was any attempt made to show any of these purported sources of competition actually functions to provide competitive discipline to a franchised cable operator.

thority to the FCC is consistent with the general structure of the Cable Act, and with the specific responsibilities that the Act gives to local governments that require independent authority to set and enforce technical standards. Congress would not explicitly have given local governments such extensive responsibilities, yet silently have given the FCC the discretion to preempt and undercut the ability of local governments to carry out these responsibilities.

Where Congress intended federal preemption of local authority over cable television, it specifically stated so in in the Cable Act. It did not provide in the Cable Act for federal preemption of technical standards. Further, since the Cable Act explicitly sets forth a comprehensive scheme for the regulation of cable television, Congress cannot be presumed to have legislated by silence and thus continued the FCC's pre-Cable Act preemption policies.

ARGUMENT

I. A FEDERAL AGENCY MAY NOT PREEMPT STATE OR LOCAL LAW OR REGULATION UNLESS CONGRESS HAS CLEARLY GRANTED THE AGENCY THE AUTHORITY TO DO SO

As this Court has recently held, a federal agency may preempt state or local law only when it is acting within the scope of its congressionally delegated authority. *Louisiana Public Service Comm'n v. F.C.C.*, 106 S.Ct. 1890, 1901 (1986); *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). The issue in this case is whether the FCC's preemption of technical standards for cable systems is valid in the absence of any congressional authorization for such preemption.[9]

[9] This case poses a different question than most of the preemption cases decided by this Court. Usually, the fundamental question has been whether a federal statute or regulation, in the absence of an explicit expression of intent, does in fact preempt a particular state law or regulation. *See, e.g., Metropolitan Life Ins. Co. v. Mass.*, 105 S.Ct. 2380 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Preemption may occur only when Congress, in enacting a federal statute, expresses a clear intent to preempt state law. *Louisiana Public Service Comm'n v. F.C.C.*, 106 S.Ct. at 1898. Congress may manifest its intent to preempt in several ways. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. It may, of course, explicitly define the extent to which it intends to preempt state law. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 (1983). In the absence of express statutory language, Congress may indicate an intent to occupy an entire field of regulation by, for example, conferring plenary authority on a federal agency to regulate in a certain area. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. at 159-70. Congress may also preempt by authorizing federal regulations that actually conflict with state law, thus making compliance with both impossible. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43. However, federal regulations may not preempt state regulations where it is possible to comply with both federal and more stringent state regulations at the same time. *Id.* Finally, federal law may preempt when state law stands as an obstacle to accomplishment of the full purposes and objectives of the federal legislation. *Hines v. Davidowitz*, 312 U.S. at 67. *See also Louisiana Public Service Comm'n v. F.C.C.*, 106 S.Ct. at 1898-99; *Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469-70 (1984).

The prerequisite for the validity of each type of preemption is clear congressional intent, such intent being the "ultimate touchstone" for determining a statute's

preemptive effect. *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 375 U.S. at 103. An important reason for the requirement that Congress clearly determine to preempt is respect for federalism and caution that the federal-state balance "not be disturbed unintentionally by the Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. at 525. As a result, this Court has found a general presumption against preemption. *Metropolitan Life Ins. Co. v. Mass.*, 105 S.Ct. at 2390.

These general principles of preemption must govern the specific preemption issue in this case: Whether Congress, in enacting the Cable Act, granted the FCC discretionary authority to preempt regulation of technical standards by local governments. In *Louisiana Public Service*, this Court decided a very similar issue. There, the Court reviewed an FCC regulation that attempted to preempt certain state regulations on the depreciation of telephone plant and equipment. The Court looked to the relevant statute, the Communications Act of 1934, "simply to determine where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions. . . ." 106 S.Ct. at 1894 (emphasis in original). The answer was found in "the language, structure, and legislative history of the Act. . . ." *Id.* In *Louisiana Public Service*, the FCC urged, *inter alia*, that it could preempt inconsistent state regulation because such state regulation would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 106 S.Ct. at 1901.

In effect, the FCC relies on the same argument here. It claims that it seeks to protect the national market for cable television equipment from being "severely burdened by disparate and conflicting local regulations and standards." *Report and Order*, Appendix to Petition for Writ of Certiorari at 69. However, as the Court pointed out in *Louisiana Public Service*, while federal regulation may

preempt state regulation that stands as an obstacle to federal purposes, an agency may not make such a preemption determination unless Congress has given the agency authority to preempt. Thus, the crucial issue here, as in *Louisiana Public Service*, is not whether the agency correctly determined that state regulation might reasonably present an obstacle to federal policies, but whether Congress itself had that view, and acted to confer preemptive power on the agency.

As the Court said in *Louisiana Public Service*, "an agency literally has no power to act, let alone pre-empt . . . unless and until Congress confers power upon it." 106 S.Ct. at 1901. "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.* Thus, the agency may not argue simply that it may preempt if preemption will best effectuate federal policy because "[a]n agency may not confer upon itself power." *Id.* The Court pointed out that the Communications Act "not only established dual state and federal regulation," but "it also recognizes that jurisdictional tensions may arise. . . ." 106 S.Ct. at 1902.

This case , then, presents essentially the same questions as *Louisiana Public Service*. An administrative agency has taken action to preempt state and local regulation in the absence of express authorization by Congress. The Court must determine whether Congress in the Cable Act invested the agency with the discretion to do so. Considering, in turn, the express language, the structure, and the policies of the Cable Act, it becomes clear that Congress did not intend to authorize the FCC to preempt all local regulation of technical standards, but intended to reserve to local governments the authority to set and enforce such standards.

II. THE EXPRESS LANGUAGE OF THE CABLE ACT DOES NOT GRANT THE FCC AUTHORITY TO PREEMPT STATE AND LOCAL REGULATION, NOR DOES THE LEGISLATIVE HISTORY IMPLY SUCH AUTHORITY

Examination of Section 624 of the Cable Act, 47 U.S.C. § 544, shows that Congress did not grant preemptive authority to the FCC, but rather that Congress intended to reserve independent authority over technical standards to local governments. Section 624 of the Cable Act addresses federal and local regulatory responsibilities for the technical aspects of cable systems. Within this section, the only specific reference to "technical standards" is in subsection (e), which provides that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. § 544(e). This provision contains no mention of any grant of authority to the FCC to preempt local regulation. Because Congress clearly had the opportunity to express in the statutory language an intent to establish federal supermacy, but did not do so, the inquiry should be at an end. As discussed above, preemption is disfavored and is not to be presumed.

Moreover, the relevant parts of the legislative history of Cable Act do not support any claim of FCC preemptive authority. *See* Committee Report at 26-27, 68-70, 1984 U.S. Code Cong. & Admin. News at 4643-44, 4705-06. In its discussion of Subsection 624(e), the Committee states that the grant of authority to the FCC to set technical standards "does not affect the authority of the franchising authority to establish standards regarding facilities and equipment . . . which are not inconsistent with standards established by the FCC. . . ." Committee Report at 70, 1984 U.S. Code Cong. & Admin. News at 4707. In the Court of Appeals, the majority agreed with the FCC that the words "not inconsistent

with" authorized the agency to preempt any standard that "exceeds" the FCC's own standard. 814 F.2d at 726. As the dissent pointed out, however, "[t]o say that local franchisors have no authority to impose more stringent standards is to say they have no authority at all, because less stringent regulations only track already binding federal requirements." *Id.* at 730 (Mikva, J., dissenting). The majority's broad reading of the words "not inconsistent with" is contrary to the interpretation of "inconsistent" in other preemption cases. *See Jones v. Rath Packing Co.*, 430 U.S. at 540; *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 823-24 (1st Cir. 1979). Because preemption is disfavored and to be avoided if possible, "not inconsistent with" should be read to rule out only those local regulations that are truly in conflict with federal law where it is not possible for a person to comply with both state and federal regulations.

There is no doubt that this more limited interpretation of "not inconsistent with" governs if the purpose of Subsection 624(e) is considered. It is clear from the plain language of the statute that Congress meant to give to local governments some quantum of authority to establish technical standards. The real issue here is whether Congress also meant that this quantum of authority could be nullified at the discretion of the FCC. As indicated above, Congress, if it had wished to do so, could have explicitly given the FCC sole authority over technical standards or given it the power to preempt. It did neither, and the legislative history indicates that there was no intent to do so, even implicitly. The legislative history states that allowing the FCC to set technical stanadrds "does not affect" the authority of local governments to establish standards. Committee Report at 70, 1984 U.S. Code Cong. & Admin. News at 4707. It would have been inconsistent for Congress to have stated that the FCC authority "does not affect" the authority

of local governments if, at the same time, Congress had intended the grant of authority to the FCC to include preemption since the preemption of authority would certainly "affect" it.

III. THE OVERALL STRUCTURE OF THE CABLE ACT AND THE NATURE OF THE RESPONSIBILITIES DELEGATED TO THE FRANCHISING AUTHORITIES INDICATE THAT CONGRESS DID NOT INTEND THE FCC TO HAMSTRING LOCAL REGULATION BY PREEMPTING TECHNICAL STANDARDS

The Cable Act's overall structure is based on the assumption that franchising authorities will have the authority to set and enforce technical standards locally. Congress gave to franchising authorities certain responsibilities—including authority over franchise renewals, facilities and equipment, franchise enforcement, access channels and consumer protection—that require the ability to set and enforce technical standards.[10] It would have been inconsistent with this delegation of responsibilities for Congress simultaneously to have granted the FCC the discretionary authority to deprive local regulators of key tools necessary to carry out these responsibilities.

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[10] The Cable Act establishes local authority to regulate by defining areas of local responsibility. The primary areas of local responsibility include: regulation of cable channels for public, educational, and governmental access use under Section 611, 47 U.S.C. § 531; authority to impose general franchise requirements under Section 621, 47 U.S.C. § 541; authority to require payment of franchise fees under Section 622, 47 U.S.C. § 542; authority to impose rate regulation under certain circumstances under Section 623, 47 U.S.C. § 543; authority to regulate facilities, services and equipment under Section 624, 47 U.S.C. § 544; authority regarding requests for modification of franchise obligations under Section 625, 47 U.S.C. § 545; authority over the terms and conditions of franchise renewal under Section 626, 47 U.S.C. § 546; and authority to regulate to protect cable consumers under Section 632, 47 U.S.C. § 552.

A. The Renewal Provisions Of The Cable Act Effectively Require The Franchising Authority To Establish Reasonable Technical Standards

Section 626 of the Cable Act establishes a detailed process for the consideration of franchise renewal requests. Congress intended to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter. . . ." 47 U.S.C. § 521(5). The legislative history leaves no doubt about the importance of this congressional goal, and discusses extensively the need for a fair, objective renewal process. *See* Committee Report at 72, 1984 U.S. Code Cong. & Admin. News at 4709. Thus, if an operator's past performance was satisfactory and its proposal for future service is deemed to be responsive to community needs and interests, the operator has a reasonable expectation of having its franchise renewed.

Significantly, Congress delegated the entire responsibility for renewal to local franchising authorities. Section 626 provides for a formal proceeding to determine whether a cable operator's franchise should be renewed, taking into account whether "the quality of the operator's service, *including signal quality*, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level or cable services . . . provided over the system, *has been reasonable in light of community needs*. . . ." 47 U.S.C. § 546(c)(1)(B) (emphasis supplied). The legislative history of this section emphasizes the fact that, in considering whether to renew, the franchising authority should concern itself with how well the cable system actually delivers the product to its customers. " 'The quality of the operator's service' does refer to the services associated with day-to-day operation (e.g., response to consumer complaints signal

quality, billing)." Committee Report at 74, 1984 U.S. Code Cong. & Admin. News at 4711.

It is clear, then, that Congress intended franchising authorities to make judgments during the renewal process about the signal quality that the cable operator has provided. Signal quality should not be subjectively measured since differences in perception of signal quality by cable subscribers will be caused by individual differences in perception and expectation and by the differing capabilities of television sets. It would be very difficult for a franchising authority to evaluate signal quality fairly without reference to objective technical standards.

Two inferences may be drawn from the importance of the evaluation of signal quality in the renewal process, only the first of which was made by the majority below. 814 F.2d at 727. First, Congress intended local governments to be able to require meaningful technical standards so that the cable operator's performance could be judged objectively. Second, and more important to the issue in this case, Congress could not have intended to give the FCC the power to preempt local authority to establish meaningful technical standards since this would effectively deprive franchising authorities of the ability to deny renewal to operators who provide poor signal quality, even though Congress has explicitly allowed franchising authorities to do so.

B. The Authority To Regulate Facilities And Equipment Implies The Authority To Set And Enforce Reasonable Technical Standards

Section 624 of the Cable Act provides, subject to certain limitations, that services, facilities and equipment may be regulated by the franchising authority.[11] Sub-

[11] Section 624 first provides that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter." [Continued]

sections 624(b) and (c) distinguish between preexisting franchises and new franchises, primarily in terms of enforcing "service" requirements, but both of those subsections authorize local governments to require and enforce franchise provisions "for facilities and equipment" without significant limitation. At the same time, it limits the authority of local governments to require "video programming or other information services. . . ." 47 U.S.C. § 544(b). Section 624, therefore, distinguishes the technical aspects of cable service from the programming decisions, and gives franchising authorities the broad power to regulate the technical aspects, i.e., facilities or equipment. As the Committee explained in the legislative history: "The ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community. . . ." Committee Report at 26, 1984 U.S. Code Cong. & Admin. News at 4663.

Neither the facilities nor equipment regulatory functions is possible without the capability to establish technical standards tailored to the particular cable facility or equipment required. In cable television, technical standards are integral to system facility design. One example of the link between facilities and technical stand-

[11] [Continued]

47 U.S.C. § 544(a). It is important to note that this limitation ("may not regulate") and the exceptions to it ("except to the extent consistent with") refer not only to Section 624 but to "this subchapter," that is, the entire Cable Act. Thus, a franchising authority's power to regulate services, facilities, and equipment involves other powers in addition to those in Section 624. Other grants of authority to local governments to regulate services, facilities and equipment are contained in, for example, Section 611, 47 U.S.C. § 531 (channels for public, educational and governmental access); Section 621, 47 U.S.C. § 541 (general franchise authority); Section 625, 47 U.S.C. § 545 (modification of requirements for services, facilities, or equipment); and Section 632, 47 U.S.C. § 552 (consumer protection provisions).

ards involves institutional networks, which a franchising authority may require for the provision of two-way video, voice and data communication between institutions such as municipal offices, libraries, hospitals, police and fire stations. *See* Committee Report at 26, 68, 1984 U.S. Code Cong. & Admin. News at 4663, 4705. Without the ability to set and enforce appropriate technical standards, such a system may not work. *See* Hammett & Edison, Inc., Engineering Statement, J.A. at 64-66.

In short, because Congress gave local governments the authority to require franchise provisions concerning facilities and equipment, it stands to reason that Congress intended local governments to have the tools to make such franchise provisions enforceable in an objective manner.

C. Other Responsibilities Imposed By The Cable Act On Franchising Authorities Imply The Power To Set And Enforce Technical Standards

Three other provisions of the Cable Act also indicate congressional intention to grant franchising authorities power to set and enforce technical standards. Most basic of these is the authority in Section 621 to award franchises. 47 U.S.C. § 541. Under this section, Congress delineated "matters subject to state and local authority," including "terms and conditions related to the grant of a franchise . . . , the construction and *operation of the system* . . . , and the enforcement and administration of a franchise. . . ." Committee Report at 59, 1984 U.S. Code Cong. & Admin. News at 4696 (emphasis supplied).

Under this grant of authority, local governments carry out the day-to-day administration of cable franchise agreements which set forth in considerable detail the obligations of the franchise, including system performance requirements. As with the assessment of a cable operator's past performance for renewal purposes, objectivity is important in assessing whether an operator is

meeting its contractual obligations and evaluating current performance if there are subscriber complaints. In making such a general grant of authority to local governments to administer franchises, Congress must have intended them to have the authority necessary to police franchise requirements, including those where technical standards are the only reasonable method of evaluating performance.

Access channels present the same sort of enforcement issue. In Section 611, Congress gave to local governments extensive authority to "establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use. . . ." 47 U.S.C. § 531(a). This power is extensive, as evidenced by the language in Subsection (c), which states that a "franchising authority may enforce *any requirement* in any franchise regarding the providing or use of such channel capacity." 47 U.S.C. § 531(c) (emphasis supplied). The FCC has never set technical standards that apply to access channels, even though the agency at one time said that such standards were necessary.[12] This presents the illogical possibility that a franchising authority has the power to enforce any access channel requirement, yet does not have the power to set technical standards for those channels that would ensure signal quality that is adequate for viewing. Congress could not have intended such a result.

The consumer protection provision of Section 632 states that local governments may impose "customer service requirements." 47 U.S.C. § 552. The legislative history adds that "customer service means the direct business relation between an [sic] cable operator and a sub-

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[12] *Report and Order*, 36 F.C.C.2d at 204. Under the FCC's classification system an access or local origination channel would be a Class II channel "used for the delivery of cable cast programming." *Id.* at 198.

scriber" including "requirements related to interruption of service. . . ." Committee Report at 79, 1984 U.S. Code Cong. & Admin. News at 4716. Interruption of service is typically defined in cable franchises as a reliability factor, which is a technical standard element. Because Congress included a separate provision endorsing a local government's efforts to protect consumers, even though this authority is certainly encompassed within the general franchising power, one can infer that Congress considered consumer protection an important responsibility. Yet the FCC's preemption of technical standards makes the job of consumer protection especially difficult without objective performance standards, a result Congress surely did not anticipate.

In summary, each of the above provisions of the Cable Act involves an explicit grant of authority by Congress to local governments. In each case, the authority implicitly includes the ability to ensure that the service provided to cable consumers is of satisfactorily viewable quality. It defies logic to suggest that Congress intended to give the FCC authority to make enforcement of signal quality and other technical requirements difficult, if not impossible, by the preemption of meaningful technical standards.

IV. BECAUSE THE CABLE ACT IS A COMPREHENSIVE STATUTE, NO FEDERAL PREEMPTION MAY BE INFERRED WHERE NOT SPECIFICALLY STATED

In its *Report and Order* preempting local establishment of technical standards, the FCC made much of supposed congressional acquiescence in its pre-Cable Act preemptive policy. The agency stated that "Section 624 (e) . . . appears to specifically anticipate the continuation of our existing policy" because "it specifies that the 'Commission may establish technical standards relating to facilities and equipment. . . .'" *Report and Order*,

Appendix to Petition for Writ of Certiorari at 72. The "existing policy" referred to was the Commission's preemption in 1974 of any regulations more stringent than its technical standards for Class I signals, and any local regulation at all of non-Class I signals. *See Report and Order*, 49 F.C.C.2d at 470. The majority below accepted this argument in part. 814 F.2d at 727. The FCC's argument is unsound for two reasons. First, where Congress intended federal preemption, it made its intention clear. Second, the Cable Act is a comprehensive resolution of cable television regulatory issues and, therefore, no approval of preexisting policies by silence can be inferred.

A. Congress Specified Several Areas Of Federal Preemption In The Cable Act But Did Not Do So With Regard To Technical Standards

When Congress did intend in the Cable Act that federal regulation preempt local regulation, it made its intention abundantly clear. Analysis of the relevant provisions of the Cable Act shows that Congress carefully delineated those areas in which it determined to preempt local regulatory authority. First, with regard to ownership restrictions, Section 613 of the Cable Act, 47 U.S.C. § 533, clearly indicates that federal policies on cross-ownership between cable operators and common carriers and broadcasters are to predominate. Subsection 613(a) specifically prohibits cross-ownership of a co-located television broadcast station and a cable system. 47 U.S.C. § 533(a). The intention here was to "codif[y] the FCC's current rule prohibiting common ownership of a television broadcast licensee and a cable system. . . ." Committee Report at 56; 1984 U.S. Code Cong. & Admin. News at 4693. Section 613 not only codifies current FCC policy but it also "preempts state and local governments, and franchising authorities, from prescribing rules with respect to the ownership of cable systems and media of mass communications. . . ." 47 U.S.C. § 533(d).

Another area of potential conflict between federal and local cable regulation is the area of rate regulation. Section 623 of the Cable Act, 47 U.S.C. § 543, clearly states that the franchising authority can rate regulate only where "effective competition," as defined by the FCC, does not exist. Even though the FCC had preempted local rate regulation of all but "basic" cable service (that service regularly provided to all subscribers) before the Cable Act, *see In re Community Cable TV, Inc.*, 98 F.C.C. 2d 1180, 1182 n. 2 (1984), the Cable Act clearly specified that federal policy would henceforth preempt most local rate regulation.

Regulation of SMATV systems was also a battlefield between the FCC and local governments before passage of the Cable Act, with the FCC asserting preemption and being upheld by the courts. The Commission preempted regulation of "private" cable systems, such as those serving individual apartment buildings and not making use of public ways. *See Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), *aff'd New York State Comm'n on Cable Television v. F.C.C.*, 749 F.2d 804 (D.C. Cir. 1984). Whatever dispute remained at the time the Cable Act was passed, Congress demonstrated its intent in the Act effectively to deprive local governments of the power to regulate SMATV systems by excluding SMATV's from the definition of "cable systems," and thus from being subject to local franchising authority. 47 U.S.C. § 522 (6); *see also* Committee Report at 44, 1984 U.S. Code Cong. & Admin. News at 4681.

B. Because The Cable Act Is A Comprehenisve Resolution Of Cable Television Regulatory Issues, The FCC's Preexisting Preemption Policies Are Irrelevant

Congress intended its delegation of authority in the Cable Act with respect to technical standards and, indeed, in all areas of cable television regulations, to be compre-

hensive. The Act supercedes the authority that the FCC exercised over cable television generally under its "ancillary to broadcasting" jurisdiction pursuant to the Communications Act of 1934. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Cable Television Report and Order*, 36 F.C.C.2d at 211; *Report and Order*, 49 F.C.C.2d at 481; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984). Congress intended to supplant the FCC's regulation of cable under the Communications Act, which "was enacted well before the advent of cable television." Committee Report at 19, 1984 U.S. Code Cong. & Admin. News at 4656. Thus, the Cable Act established "a national policy that clarifies the current system of local, state and Federal regulation of cable television" and "firmly establish[es] the authority at each level of government." *Id.* at 24, 1984 U.S. Code Cong. & Admin. News at 4661.

After extensive discussion of the problems that had arisen under the existing system of regulation, the legislative history stated that a significant purpose of the legislation was "to address the problems which have arisen in the franchise process, and *to provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems.*" Committee Report at 22, 1984 U.S. Code Cong. & Admin. News at 4658 (emphasis supplied). In describing the legislation on the House floor, the Chairman of the Subcommittee on Communications expressed the congressional intention: "H.R. 4103 establishes a *comprehensive* national policy that clarifies the current patchwork of local, State and Federal regulation of cable television." 127 Cong. Rec. H10435 (daily ed. October 1, 1984) (statement of Rep. Wirth) (emphasis supplied).

The comprehensive nature of the Cable Act is evidenced not only by the Act's expressed purposes, its legislative history and the statements of the legislation's floor manager, but first and foremost by the provisions of the Act

itself, which addresses every significant aspect of cable television policy. The Cable Act legislates with respect to the entire gamut of cable regulatory issues from the initial grant of franchises to their expiration and renewal. The Cable Act clearly ended the earlier regulatory scheme under which the FCC had taken upon itself most regulatory authority and left to local officials only the "responsibility for the non-operational aspects of cable franchising." *Report and Order* in Docket No. 20272, 54 F.C.C.2d 855, 863 (1975). In contrast, Congress gave local governments authority in several important "operational" areas, including responsibility for access channel requirements, facilities and equipment requirements, franchise modification procedures, and renewal.

In short, the Cable Act was intended to, and did, establish an entirely new scheme of regulation for cable television and reallocated responsibilities between federal, state, local authorities. Thus, the lower court's reliance on the fact that Congress had legislated "against the backdrop of the Commission's preexisting preemption regulation without criticizing that regulation" (814 F.2d at 725) as a basis for inferring that Congress intended to continue the preexisting preemption is erroneous. Where Congress intended to establish or continue federal supremacy in cable regulation, it clearly expressed its intention to do so. And where it did not express that intention, it would be improper to infer any such intent, particularly given the comprehensive nature of the Cable Act.

CONCLUSION

This Court has made abundantly clear that a federal agency may preempt state and local law only when Congress grants the agency authority to do so, over and above a general grant of authority to regulate in a particular area. There is no such grant in the Cable Act. Therefore, the decision below must be reversed insofar as it upholds the FCC's preemption of local authority to establish and enforce technical standards.

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